In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6875

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SUPREME COURT, U.S.

DAVID EARL DILLARD,

Petitioner,

-v-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

DAVID EARL DILLARD,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on March 13, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 285 N.C. 72, 203 S.E.2d 6 (1974) and is set out in Appendix A hereto, pp. 1a-4a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of North Carolina was entered on March 13, 1974 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether petitioner was denied Due Process of Law by the arbitrary refusal of the North Carolina courts to permit his counsel to inform the trial jury that a verdict of conviction entailed a sentence of death, when the jury was not otherwise informed that life or death hinged on its verdict?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> § 14-17. Murder in the first and second degree defined; punishment.- A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.1/

1/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

§ 15-187. Death by administration of lethal gas. -Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor.

§ 15-188. Manner and place of execution. -The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article.

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on March 13, 1974, affirming petitioner's conviction and death sentence. Petition, David Earl Dillard, a black man, was sentenced to die on August 1, 1973, in the Robeson County Superior Court of North Carolina, upon conviction for the first degree murder of his wife, Mrs. Mattie Bell Dillard. 2/

2/ Petitioner's sentence of death was imposed under N.C. Gen. Stat. §14-17, as construed by the Supreme Court of North Carolina in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). See pp. 16-18, infra. The North Carolina Legislature enacted a statute S.B. 157, Chap. 1201, 1973 Sess. (2nd Sess. 1974) on April 8, 1974 which imposes the death penalty for first degree murder, but this statute was enacted subsequent to the decision of the North Carolina Supreme Court in petitioner's case and provides that it is applicable to offenses committed after its ratification.

On Easter Sunday, April 22, 1973, between 7:30 a.m. and 8:00 a.m., Mrs. Thelma Davis saw a man with a gun[3/] in his hand go to the back of the Chrysolite A.M.E. Zion Church which was about fifty feet from her house. The same man returned to her house without any gun around 10:00 a.m. that morning to inquire what time church began, and she recognized him as the same man who had walked around the church earlier that morning. She identified this man as petitioner.

The church janitor, Mr. John Bell, testified that petitioner had spoken to him when he opened the church a little after 9:00 a.m., asking if he could wait in the church. The witness, who recognized petitioner as a member of the congregation, gave him permission, and petitioner sat in the back of the church.

A Sunday School teacher, Mrs. Mattie Purdie, was conducting her class near the pulpit about 10:00 a.m., when she suddenly heard a commotion in the back of the church, and saw petitioner shoot his wife, Mrs. Mattie Bell Dillard, with a single shot shotgun. As his wife lay in the aisle, petitioner fired two more shots at her. Mrs. Purdie gathered petitioner's son into her

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3/ In the trial transcript, State v. Dillard, Robeson County Superior Court, No. 73-Cr-5807 (July 31, 1973) at 12, Mrs. Davis describes what petitioner was carrying as a "long gun", and in response to the question of the District Attorney, "Do you know what kind of gun it was?" replied, "No, sir, I don't." Ibid. The Statement of Case on Appeal, however, states that Mrs. Davis testified petitioner carried a "shot gun." R. 6. The Court is familiar with the North Carolina practice of narrating the transcript on appeal. See Bumper v. North Carolina, 391 U.S. 543, 546, n. 8 (1968).

arms and pleaded with him to stop shooting. He responded, "they took the baby and wouldn't take me." R.7.

Mr. Lee Junior Hammonds, Mrs. Dillard's brother, testified that he had accompanied Mrs. Dillard and her one year old son to Sunday School that morning, and that as they walked into the back of the church, petitioner had shot his wife with a shotgun and then had begun chasing him, shooting at him, his wife and their children. He testified that he had fled into Mrs. Thelma Davis' house, and that he had been wounded slightly in the foot. Another witness, Mrs. Rosa Regan, also was an eye witness to the shooting of petitioner's wife and was chased by petitioner into Mrs. Davis' house. Two other witnesses, Mr. Horace Hammonds (another of Mrs. Dillard's brothers) and Mrs. Erma Hammonds (Mr. Lee Junior Hammonds' wife) also described how petitioner had opened fire with a shotgun in the church and had chased them afterwards, shooting at them. There was testimony that after the Hammonds had run into the Davis house, petitioner shot at Mr. Horace Hammonds, who had taken refuge behind a car in the parking lot, and at his mother-in-law and father-in-law, who were in a car near the church.

Deputy Sheriff Luther Sanderson testified that he examined the body of Mrs. Dillard in the morgue and that she had sustained three shotgun wounds, one in the jaw, one in the right arm, and one in the right side.

A state highway patrolman, K. K. Daniels, testified that on the morning of April 22, 1973, he had seen a man carrying a shotgun walking along the road about half a mile from the church. The pedestrian, whom he later determined to be petitioner,

told him that he was the one the patrolman was looking for, because he had just killed his wife. Petitioner voluntarily surrendered the 20 gauge single barrel shotgun. Officer Daniels did not search petitioner at any time. On the way to the police station, petitioner remarked that "had it not been for his mother-in-law's interference, it wouldn't have happened." R.11. The patrolman further noted that:

> "He made no threatening gestures towards me and at the time that I stopped, he handed the gun to me very carefully with the butt of the gun first. His voice was trembling, there were tears in his eyes, and his hands were shaking."

R.11-12.

When petitioner was taken to the Sheriff's Office, he was interviewed by Deputy Sheriff Willis Walters, who first warned petitioner that he did not have to answer questions, that anything he said could be used against him, that he had a right to have a lawyer present, and that if he could not afford to hire a lawyer, one would be provided. Petitioner inquired about the condition of his wife and of his baby. He admitted smuggling the shotgun into the church under a car coat. Deputy Walters testified that petitioner:

> "expressed concern about the condition of hi wife and the location of his child. He was especially concerned about the small child . . . . He never displayed any hostility toward me or anyone else in my presence. He told me that he had shot his wife due to family problems. That his problems were due to his mother-in-law. That ever since he had been married, he loved his wife but his wife always listened to his mother-in-law and would not listen to him, and that they could not stay together and make a go of it with his

mother-in-law always telling her what to do." 4/

R.13.

The veniremen who formed the jury which tried petitioner were asked no questions on voir dire concerning capital punishment, and were not told that the charge of first degree murder was capital. Shortly before closing arguments were made, the trial court ruled that counsel would not be allowed to argue the question of punishment to the jury. R.13. The jury returned a verdict of guilty of first degree murder, and the court thereupon sentenced petitioner to die.

On March 13, 1974, the Supreme Court of North Carolina affirmed petitioner's conviction and death sentence with three Justices dissenting in regard to the death penalty. On March 25, 1974, Chief Justice William A. Bobbitt of the North Carolina Supreme Court stayed execution of the judgment in order to allow a petition for certiorari to be filed in this Court.

4/ Mr. Lee Junior Hammonds testified that petitioner and his wife had been married for about three years on April 22, 1973, and that they had initially lived in the home of Mrs. Dillard's parents. They had separated for a while, had then been reconciled but about three or four weeks prior to the shooting had become estranged again, and Mrs. Dillard and their son had moved back in with her parents. R.8.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. After petitioner was sentenced to death, he moved to arrest judgment, and this motion was denied. R. 14.

Petitioner's Grouping of Exceptions and Assignments of Error in the Record on Appeal to the North Carolina Supreme Court (R. 13-14) assigned as error the following:

> "3. The action by the Court in [overruling] the defendant's motion in arrest of judgment."

In his brief in the Supreme Court of North Carolina, petitioner argued that: "THE COURT ERRED PREJUDICIALLY TO THE APPELLANT IN OVERRULING THE DEFENDANT'S MOTION IN ARREST OF JUDGMENT IN THAT THE DEATH SENTENCE IMPOSED UPON APPELLANT IS LEGALLY UNAUTHORIZED AND CONSTITUTES A CRUEL AND UNUSUAL PUNISHMENT PROHIBITED BY THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES." Brief of Appellant at 34. Under the latter argument, petitioner raised four contentions:

> "A. The Death Penalty is Unauthorized by any Constitutionally Valid Statute of the State of North Carolina" (Brief of Appellant at 4-12);
>
> "B. Despite this Court's Decision in STATE v. WADDELL, 282 NC 431, 194 SE 2d 19 (1973), Capital Punishment in North Carolina Is Still Imposed in a Selective and Arbitrary Manner that Violated the Rule of FURMAN v. GEORGIA, 408 US 238 (1972)" (Ibid. at 12-36);
>
> "C. The Penalty of Death, Imposed Pursuant to a Post-WADDELL Capital Conviction, Constitutes Cruel and Unusual Punishment Prohibited by the Eighth and Fourteenth Amendments to the United States Constitution Because Enlightened Public Opinion Has Overwhelmingly Repudiated the Death Penalty" (Ibid. at 36-58);
>
> "D. Regardless of the Procedural System Under Which It Is Inflicted, the Imposition of Capital Punishment Is Excessively and Unnecessarily Cruel in Light of Contemporary Standards of Decency and

Dignity Enshrined in the Eighth Amendment" (Ibid. at 58-75).

The Supreme Court of North Carolina rejected this argument stating:

> The defendant's third, and last, assignment of error is to the overruling of his motion in arrest of judgment on the ground that the death sentence imposed upon the appellant is not authorized by a constitutionally valid statute of this State, but is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States . . . . All of the contentions of this defendant . . . upon this question were carefully considered by us and found to be without merit in State v. Jarrette [284 N.C. 625, 202 S.E. 2d 721 (1974)]." 5/

203 S.E.2d at 9 (App. 4a).

II. In a motion at the close of all the evidence, petitioner moved "that he be allowed to argue the question of punishment in final summation", R. 13, which the court denied.

Petitioner's Grouping of Exceptions and Assignments of Error in the Record on Appeal to the North Carolina Supreme Court (R. 13-14) assigned as error the following:

> "2. The action by the Court in [overruling] the defendant's motion that he be allowed to argue the question of punishment in final summation.

In his brief in the Supreme Court of North Carolina, petitioner argued that "THE COURT ERRED, PREJUDICIALLY TO THE DEFENDANT, IN ITS REFUSAL TO PERMIT COUNSEL TO ARGUE THE MATTER OF PUNISHMENT TO THE JURY IN FINAL SUMMATION," Brief of Appellant at 2-3.

5/ A dissenting opinion stated: "BOBBITT, C.J., and HIGGINS and SHARP, JJ., dissent as to death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in State v. Jarrette, N.C., 202 S.E.2d 731 (1974)" 203 S.E.2d at 9 (App.4a).

The Supreme Court of North Carolina rejected this argument stating:

> "There was no error in the court's ruling that the defendant's counsel could not make an argument to the jury upon the question of the punishment to be imposed." 203 S.E.2d at 9 (App. 4a).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This case and four ccntemporary cases[6/] present the question of the constitutionality of the death penalty as that penalty was resurrected inthe State of North Carolina by a four-to-three vote of the North Carolina Supreme Court following Furman v. Georgia, 408 U.S. 238 (1972). A brief review of post-Furman developments relating to the death penalty in the United States generally and in North Carolina particularly sets the question in perspective.

The nearly universal response of state courts in obedience to Furman was to hold that death sentences could no longer be meted out under the capital punishment laws which had been in effect prior to June 29, 1972, and which the Furman decision

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6 / Crowder v. North Carolina, O.T. 1973, No. 73-
Henderson v. North Carolina, O.T. 1973, No. 73-
Jarrette v. North Carolina, O.T. 1973, No. 73-
Noell v. North Carolina, O. T. 1973, No. 73-

of that date declared unconstitutional.[7/] Subsequently, statutes

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7/ See, e.g., United States v. Lee, 489 F.2d 1242 (CA DC 1972); United States v. Woods, 484 F.2d 127, 138 (CA4 1973) ("Since the decision in Furman v. Georgia, ... the statute under which defendant was convicted of first degree murder, 18 U.S.C. §111, provides as the only possible sentence imprisonment for life" at 138); United States v. McNally, 485 F.2d 398 (CA8 1973); Hubbard v. State, 290 Ala. 118, 274 So.2d 298 (1973) ("There is no question that Furman has, as of now, eliminated the death penalty from our statute. The elimination of the death penalty does not destroy the entire statute. The only sentence which can now be imposed upon conviction of the crime of murder in the first degree is life imprisonment." 274 So.2d at 300); State v. Endreson, 109 Ariz. 117, 506 P.2d 248 (1973) ("In view of [the Furman ruling] we hold that the death penalty provisions of [the Arizona murder statute] are unconstitutional." 506 P.2d at 254); O'Neal v. State, 253 Ark. 574, 487 S.W. 2d 618 (1972); People v. Murphy, 8 Cal. 3d 369, 105 Cal. Rptr. 138, 503 P.2d 594 (1972); State v. Aillon, ___Conn.___, 295 A.2d 666 (1972); Anderson, et al., v. State, 267 So. 2d 8 (Fla. 1972); Sullivan et al. v. State, 229 Ga. 731, 194 S.E. 2d 411 (1972); People v. Speck, 52 Ill. 2d 284, 287 N.E. 2d 609 (1972) ("The Supreme Court of the United States has now held that a defendant could not be validly sentenced to death under [pre-Furman Illinois capital statutes]." 287 N.E.2d at 700; Adams v. State, ___Ind.___, 284 N.E.2d 757 (1972); State v. Randol, 212 Kan. 461, 513 P.2d 248 (1973) (". . .court is of the opinion that the death penalty provision of our present statute is constitutionally impermissible. The 1972 Legislature of Kansas considered but failed to enact amendatory legislation." 513 P.2d at 256); Caine and McIntosh v. Commonwealth, 491 S.W.2d 824 (Ky. 1973), cert. den. 414 U.S. 876; State v. Flood, 263 La. 700, 269 So.2d 212 (1972) ("the Furman case has eliminated 'capital offenses' in Louisiana." 269 So.2d at 214); Bartholmey v. State, 267 Md. 175, 297 A.2d 696 (1972); Commonwealth v. LeBlanc, ___Mass.___, 299 N.E.2d 719 (1973); Capler v. State, ___Miss.___, 268 So. 2d 338 (1972) (". . . the harsher penalty of death may not be lawfully imposed. The remaining part of the statute is complete. . . .We hold that because of Furman v. Georgia, the death penalty cannot be inflicted, that the remainder of the statute is valid and the only other punishment for murder is life imprisonment." 268 So.2d at 339-40); State v. Scott, 491 S.W.2d 514 (Mo. 1973) ("The sole and only punishment for first degree murder in thisstate is now life imprisonment." at 521); State v. Alvarez, No. 27435, Dist. Ct. Lancaster Cty., Neb. Oct. 4, 1972; Walker v. State, 88 Nev. 539, 501 P.2d 651 (1972); State v. Martineau and Nelson, 112 N.H. 278, 293 A.2d 766 (1972); People v. Fitzpatrick, 32 N.Y. 2d 499, 300 N.E. 2d 139 (1973), cert. den. 38 L.Ed. 2d 338, 94 S.C. 554 (1973); State v. Johnson, 31 Ohio St. 2d 106, 285 N.E.2d 751 (1972) ("Under [the Furman] holding, which we are required to follow, the infliction of the death penalty under the existing law of Ohio is now unconstitutional [with possible exceptions not relevant here]." 285 N.E. 2d at 755); Pate v. State, 507 P.2d 915 (Okla. 1973) ("After an exhaustive study of the [Furman] opinions . . . this court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as

were enacted in slightly more than half the States (and by the federal government), authorizing the use of the punishment of death in differingly defined categories of cases.[8/] The statutes vary widely in their terms and forms, and consequently vary

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7/ cont'd

the laws have been duly enacted conforming to the standards set forth in Furman v. Georgia," at 916); Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972); Hunter, et al. v. State, ___ Tenn. ___, 496 S.W.2d 900 (1972) ("The effect of [Furman] . . . is to render void the penalty of death as it exists under the statutes of Tennessee." 496 S.W.2d at 902); Lopez v. State, 500 S.W.2d 844 (Tex. Crim. 1973) (". . . we find the inescapable conclusion to be that the holding in Furman and Branch rendered it impermissible under the Constitution of the United States to impose the death penalty under our ten existing statutes." At 846); Wood v. Commonwealth, 213 Va. 346, 192 S.E.2d 808 (1972); State v. Vidal, 82 Wash.2d 94, 508 P.2d 158 (1973) ("The recent case of Furman v. Georgia . . . has the effect of preventing the imposition of the death penalty under the existing statutes of the State of Washington." 508 P.2d at 162).

8/ Some of these new statutes provide that a court or jury must make a separate determination as to whether a defendant should be sentenced to life or death independently of its finding the defendant guilty of a capital crime; conviction of a particular offense does not, therefore, necessarily result in a death sentence. Some of these laws provide a single verdict proceeding, in which the trial judge or jury must return a general verdict finding a defendant guilty of a capital degree of the offense. Del. Code, tit. 11, § 636 (1974), as amended by Del. H.B. No. 429, 127th Gen. Ass. (1974); N.H. Rev. Stat. Ann. § 630:1(I) (1973), as amended by N.H. S.B. 27, Chap. 34, Acts of 1974, N.H. Gen. Ct.; N.Mex. Stat. §§ 40A-2-1, 40A-2-1(A), 40A-29-2 (1974); N.C. Gen. Stat. §§ 14-17, 14-21, as amended by S.B. 157, Chap. 1201, 1973 Sess. Laws (2nd Sess. 1974); Tenn. Code Ann. §§ 39-2402 (as amended by Pub. Chap. 462, Tenn. Laws 1974), 39-3702 (as amended by Pub. Chap. 461, Tenn. Laws 1974) (1974). Others of these statutes provide a unitary proceeding where a jury must return a verdict finding special facts to justify the death sentence. Ind. Code § 10-3401 (1974); Ky. Rev. Stat. Chap. 507, as amended by Ky. H.B. No. 232, Reg. Sess. 1974; La. Rev. Stat. §§ 14:30, 14:42, 14:44, 14:113 (1974); La. Code

somewhat in the questions they present regarding their compliance with Furman and with the Eighth and Fourteenth Amendments to

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8/ cont'd

Crim. Proc., Art. 557, 598, 817 (1974); Miss. Code §§ 97-3-19, 97-3-65 (1974), as amended by Miss. S.B. No. 2341, Reg. Sess. 1974; Mont. Code §§ 94-5-102, 94-5-103, 94-5-105, 94-5-304 (as amended by Mont. H.B. No. 643, Mont. Gen. Laws 1974) (1974); Nev. Code § 200.030 (1974); Okla. Stat., tit. 21, §§ 701.1, 701.3, 701.6 (1974); Wyo. Stat. § 6-54 (1974). Among the new laws which provide a bifurcated proceeding to make this separate determination as to sentence, some allow imposition of sentence without any particular finding identified by the legislature as a prerequisite for imposing either a sentence of death or life imprisonment. Ga. Code § 27-2534.1 (1973), as amended by No. 74, Ga. 1973 Sess. Laws at 162-172; Utah Crim. Code §§ 76-3-206, 76-5-202, 76-5-302, 76-3-207 (1974). Others of these bifurcated trial statutes require the imposition of a death sentence when a certain finding is made at the sentencing proceeding; some identify a particular circumstance which justifies imposition of a death sentence. Cal. Penal Code §§ 190, 190.1, 190.2, 209, 219, 4500 (1974); Ill. Code §§ 5-8-1a, 9-1 (1974); Tex. Pen. Code § 19.02 (1974); Tex. Code Crim. Proc., Art. 37.071 (1974); others identify such circumstances but provide that such "aggravating" circumstances may be counterbalanced by the finding of "mitigating" circumstances in some unspecified fashion, Ariz. Rev. Stat. §§ 13-452 - 13-454 (1974; Ark. Code §§ 41-4702 - 41-4713 Fla. Stat. §§ 782.01, 794.01, 792.141 (1974); Neb. Code §§ 28-401, 29-2522, 29-2523, 29-2524 (1974); still others provide formulae for the weighting of "aggravating" against "mitigating" circumstances to determine which defendants shall be sentenced to death. Conn. Gen. Stat. § 53a-45 (1974); Ohio Rev. Code §§ 2929.03, 2929.04 (1974); Pa. Stat., tit. 18, § 4701 (1974), as amended by Pa. H.B. 1060, Act. 46, 1974 Sess.

Another group of statutes provides for the imposition of a death sentence by operation of law pursuant to a jury's or trial judge's conviction of a certain crime. Idaho Code §§ 18-4003, 18-4004 (1974); R.I. Code § 11-23-2 (1974); New York: Ass. Bill 11474, 1974 Sess. Laws.

The following States have not enacted legislation authorizing the death penalty since Furman: Alaska, Alabama, Colorado, Hawaii, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Dakota, Oregon, South Carolina, South Dakota, Virginia, Washington, West Virginia, Wisconsin, Vermont.

the Constitution.[9] It is a fair although gross generalization that, in most States, the new statutes authorize capital punishment for a narrower category of offenses than those that were punishable by death in the same States before Furman. Of the 103 men and women who have been sentenced to die in the United States since June 29, 1972, and who are presently on death row,[10] roughly two-thirds were condemned under the new post-Furman statutes.

Virtually all of the remainder[11] -- 31 men and women, to be

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9/ The first decisions by the highest court of any State affirming death sentences imposed under one of the new post-Furman statutes were handed down in a Georgia murder case, State v. House, Ga. Sup. Ct. No. 28678 (April 4, 1974)(rehearing denied, April 25, 1974); and in a Georgia rape case, State v. Eberheart, Ga. Sup. Ct. No. 28776 (April 30, 1974)(rehearing denied, May 21, 1974). Counsel for Mr. House and Mr. Eberheart (who include some of the counsel for petitioner Dillard) are presently preparing to seek review by this Court of the Georgia Supreme Court's decisions.

10/ We exclude from this computation a number of persons sentenced to death since Furman whose convictions or death sentences have been reversed or vacated on appeal. The 99 figure represents persons presently committed under unreversed and unvacated sentences of death.

11/ Seven persons have been sentenced to die since Furman under the provisions of pre-Furman statutes. The cases of six of these persons (in Massachusetts, Montana, Pennsylvania, and South Carolina) are described in note 14, infra. The remaining case arises under a Virginia statute which the Virginia Supreme Court held distinguishable from the statutes invalidated in Furman. State v. Jefferson, Va. S.C., No. 730370, decided April 22, 1974. A petition for rehearing is presently pending in Jefferson. Should it be denied, counsel for Mr. Jefferson (who are associated with some of the counsel for petitioner Dillard) anticipate that review will be sought in this Court.

exact -- are on death row in North Carolina, where post-Furman developments took a markedly different turn by the margin of a single vote on the North Carolina Supreme Court in the case of State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). Prior to 1947, North Carolina law had required the imposition of the death penalty upon all convictions for the crimes of first-degree murder, rape, first degree burglary, and arson. By enactments of 1947 and 1949, the North Carolina General Assembly provided that, in the case of convictions for any of these four offenses, the jury might spare the defendant's life by a recommendation of life imprisonment. 12/ An unanimous Supreme Court of North Carolina

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12/ The jury was given the power to recommend life imprisonment in arson and burglary cases in 1947, and in murder and rape cases in 1949. We have found no legislative history dealing directly with the 1947 enactment.

The limited legislative history available for the 1949 North Carolina legislative action reflects a clear and considered abandonment of a general mandatory death penalty. As noted in State v. Pugh, 250 N.C. 278, 168 S.E.2d 649, 642 (concurring opinion of Denny, J.), the 1947 General Assembly created a Special Commission for the Improvement of the Administration of Justice. That Commission recommended, inter alia:

> "We propose that a recommendation of mercy by the jury in capital cases automatically carry with it a life sentence. Only three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder, because, from all the circumstances, they do not believe the defendant, although guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. Our proposal is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases. We think the law can now be broadened to include all capital crimes."

[footnote continued]

concluded in Waddell that, as amended in 1947 and 1949 and operative for nearly a quarter-century between 1949 and 1972, the North Carolina statutes inflicting capital punishment for first degree murder, rape, first degree burglary and arson were unconstitutional under Furman. Three Justices of the court therefore would have held that the death penalties provided by North Carolina law on the dates of the Furman and Waddell decisions were constitutionally unenforceable then and thenceforth until (at the least) the enactment of new capital punishment legislation by the General Assembly. But a majority of four Justices

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12/ cont'd.

POPULAR GOVERNMENT (January 1949) (published by the Institute of Government, University of North Carolina, Chapel Hill, North Carolina), p. 13. The North Carolina Supreme Court commented on the legislative intent indicated by the 1949 measures in State v. McMillan, 233 N.C. 630, 65 S.E.2d 212, 213 (1951).

> "The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning, - a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature.
>
> "It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison . . . . No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right."

held that the only portion of North Carolina law invalidated by Furman was the 1949 "recommendation" provision, with the result that (prospectively from the January 18, 1973, date of the Waddell decision) North Carolina law reverted to its pre-1949 state:

> "[T]he effect of the Furman decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death." (State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, 28-29(1973).)

Under these procedures, petitioner and the other 30 persons now inhabiting North Carolina's death row were sentenced to die between the date of Waddell and the date of the enactment of a new North Carolina death penalty statute on April 8, 1974.[13/]

The question presented here is the federal constitutionality of death sentences imposed in North Carolina pursuant to the Waddell procedures and without new legislative authorization after Furman. Most immediately, that question is potentially decisive of the lives of the 31 condemned inmates in the State

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13/ See note 2, supra.

which now has the largest death row population in the Nation. It may also have direct implications for death sentencing in four other States.[14/] Depending, of course, upon the grounds on which this Court elects to consider the question, it may or it may not have implications -- of narrower or broader scope -- for the death penalties enacted by post-Furman legislation.

14/ The only other state appellate court that has dealt with Furman in the fashion of Waddell is the Supreme Court of Delaware, in State v. Dickerson, __Del.__, 298 A.2d 761 (1972). The Dickerson opinion was announced prospectively on November 1, 1972. No capital convictions were returned in the State of Delaware between that date and the dates upon which, successively, (1) a new criminal code enacted before Furman but effective July 1, 1973, came into effect, repealing the statutory provisions upon which Dickerson rested, and (2) the Delaware legislature enacted a post-Furman statute effective March 29, 1974. There is presently pending litigation in the Delaware Supreme Court raising the issues of the effects upon Dickerson of the supervening code and post-Furman enactment. State v. Smith, Del. S.C. No. 52,1974.

Trial courts in Massachusetts and South Carolina have imposed death penalties after Furman under the purported authorization of pre-Furman statutes and in apparent reliance upon the rationale of Waddell and Dickerson. Commonwealth v. Brown, Clinkscales, and Johnson, Superior Ct., Suffolk Co. (Mass.), Nos. 74502-3-4 and 74516-17-18; State v. Speights, Ct. of Gen. Sess., Florence Co. (S.C.), No. 5053. It is also possible that three post-Furman death sentences imposed in Montana and Pennsylvania under pre-Furman legislation rest upon the same rationale, although the trial judges' reasoning in these cases more likely stands upon other grounds. State v. Rhodes & Shields, Mont. S. Ct. Nos. 12596 and 12597; Commonwealth v. Martin, Pa. Sup. Ct., No. 44 (March Term, 1974). All of the cases just mentioned are presently pending in the respective Supreme Courts of the States in which they arise.

A. Evasion of the Furman Decision

The narrowest issue raised is simply whether the majority of the North Carolina Supreme Court in Waddell read Furman correctly and applied Furman permissibly in holding that Furman invalidated only the 1949 "recommendation" provision of North Carolina law, rather than the underlying death penalty. As tortured as that holding may seem -- being the lethal equivalent of a state-court holding that Brown v. Board of Education required the closing of the public schools instead of their desegregation -- it is not entirely unprecedented. Twice in recent years this Court has corrected similar manipulations of state-law severability doctrines designed to emasculate a constitutional decision of the Court forbidding the imposition and carrying out of impermissible death sentences. Funicello v. New Jersey, 403 U.S. 948 (1971)(alternative ground); Thomas v. Leeke, 403 U.S. 948 (1971).

These two cases involved provisions of New Jersey and South Carolina law which allowed capitally-charged defendants to avoid the possibility of a death sentence by pleading non vult (in New Jersey) or guilty (in South Carolina), and thus affronted the rulings in United States v. Jackson, 390 U.S. 570 (1968), and Pope v. United States, 392 U.S. 651 (1968). The South Carolina Supreme Court in Thomas recognized the incompatibility of its statutory guilty-plea scheme with the constitutional principle of Jackson, but held that the result was to invalidate and sever the guilty-plea provision, leaving the death penalty standing. The New Jersey Supreme

Court attempted to distinguish Jackson but held alternatively that, if Jackson did invalidate New Jersey's non vult provision, that provision rather than the death penalty would be rendered inoperative. In both cases, then, the state-court reaction to decisions of this Court invalidating a composite statutory death-sentencing procedure under which unknown numbers of capital defendants had escaped the death penalty while others had unconstitutionally been sentenced (and many sent) to their deaths, was to sever the escape clause, treat it as though it had never existed for constitutional as well as state-law purposes, and condemn those denied its benefits to die. In both cases, this Court declined the gambit.

What a majority of the North Carolina Supreme Court has done here, albeit by a somewhat different mechanism, is much the same thing. During a quarter of a century between enactment of the legislative "recommendation" procedure in 1949 and enactment of a new post-Furman death-sentencing procedure by the North Carolina legislature in 1974, countless men died and others guilty of identical crimes were spared death pursuant to an arbitrary selective procedure which -- as the North Carolina Supreme Court itself has concluded -- falls unmistakably within the ban of Furman. The response of four Justices of that court is to say essentially that, because the persons spared should not have been spared (under an appropriate manipulation of state severability theory), the fact that they were spared is to be disregarded in determining whether the continued application of the pre-Furman North Carolina statutes authorizing capital

punishment would be arbitrary and selective, and hence a constitutionally cruel and unusual punishment, in the wake of Furman. Thirty-one more persons are thus tossed into the death column as opposed to the now closed and hence forgotten column of the spared, upon the capital punishment ledgers of North Carolina since 1949. Whether the particular state-law contrivance by which that calculation is accomplished makes the deaths of these 31 persons any less selective, arbitrary, cruel and unusual in federal constitutional contemplation is, we suggest, an issue that this Court should address, if its Furman decision is to have the vitality and respect that the Supremacy Clause rightly commands.

B. The Lawless Imposition Of Death Penalties

The second issue presented is whether the re-institution of the death penalty which the North Carolina Supreme Court achieved by amputating life from that State's life-or-death sentencing statutes is a result that can constitutionally be effected by any device of judicial decision wholly ungoverned and undirected by legislative action. It is, of course, generally true that the federal Constitution is not concerned with how a State divides it law-making functions between its judicial and legislative organs. But that generalization cannot be permitted to sweep away the fundamental concerns of the Eighth and Fourteenth Amendments against judicial imposition of harsh criminal punishments unauthorized by law and in excess of the penalties provided by "the valid laws of the land." Giaccio v. Pennsylvania, 382 U. S. 399, 403 (1966).

Recent scholarship has underscored that the English Bill of Rights, from which the Eighth Amendment's prohibition of "cruel and unusual punishments" was derived, was in large measure directed toward preventing the exaction of unauthorized penalties.[15/] That

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15/ Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CAL. L. REV. 839, 845-847, 852-860 (1969). It is true that Granucci also finds that the American Framers imperfectly understood the English background of the cruel-and-unusual-punishment clause, and that they themselves were principally concerned with the problem of intrinsically barbaric penalties. But this does not support a conclusion that the Framers meant to diminish the scope of a guarantee that they believed basic to their traditions (see 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (1863)), or to reject protections of the citizen long preserved by their English heritage. Indeed, as early as 1635, American settlers had "conceived great danger . . . in regard that . . . magistrates, for want of positive laws, in many cases, might proceed according to their discretions," and had therefore agreed "that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws." WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686, at 5 (1889). It should hardly be surprising that the cruel-and-unusual-punishment clause, like many of the other basic guarantees of the Bill of Rights, is woven of several strands and protects against more than a single evil.

function remains a vital office of the cruel-and-unusual punishment clause today,[16] although it certainly is not the exclusive focus of the clause.[17] As this Court pointed out in Weems v. United States, 217 U. S. 349, 376 (1909), the Framers were eager to assure "that government by the people, instituted by the Constitution, would not imitate the conduct of arbitrary monarchs." The conjunction of the words "cruel" and "unusual" in the Eighth Amendment can hardly be regarded as accidental if one appreciates the relationship, within a basically popular and democratic governmental structure, of the dangers of lawlessness, irregularity, arbitrary selectivity,[18] and cruelty.[19] For, in such a structure, harsh and unsufferable criminal penalties are most likely to spring from devices that evade the rule of law or subvert the ordinary protections afforded by its regularity and generality.

Due Process of Law, too, insures against the imposition of criminal sanctions that are not decreed in strict accordance with the regular course of law.

> "[T]he terms 'due process of law' . . . come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.'" Dent v. West Virginia, 129 U. S. 114, 123 (1888).

16/ See Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 STAN L. REV. 838, 855-856 (1972).

17/ See Weems v. United States, 217 U. S. 359 (1909); Robinson v. California, 370 U. S. 660 (1962); Furman v. Georgia, 408 U. S. 238 (1972). And see note 15, supra.

18/ See section I(C), pp. 28-44, infra.

19/ This relationship is developed in Brief for Petitioner, Aikens v. California, 406 U. S. 813 (1972) [No. 68-5027], pp. 13-27, 39-56.

"The essence of [the] . . . principle of legality is limitation on penalization by the State's officials, effected by the prescription and application of specific rules.[20] So rudimentary has this principle been to American notions of Due Process, that unauthorized criminal penalties have rarely been imposed in this country;[21] but, on the rare occasions when they have been examined by this Court, the Court has treated them as self-evidently void to the extent that they exceeded what was authorized by valid legislation. Ex parte Lange, 83 U. S. 163 (1874); Ex parte Mills, 135 U. S. 263 (1890); In re Bonner, 151 U. S. 243 (1894). In this century, the root principle has been most commonly observed in its offshoots: the vagueness doctrine as applied to penalties, Giaccio v. Pennsylvania, 382 U. S. 399 (1966); the lenity principle, Ladner v. United States, 358 U. S. 169 (1958);[22] and this Court's

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20/ HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 28 (2d ed. 1960).

21/ But see Ashton v. Kentucky, 384 U. S. 195 (1966).

22/ "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication. [Citations omitted.] . . . 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.' . . . This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Id. at 177-78.

adamant refusal to undertake either the judicial fashioning of criminal punishments, United States v. Evans, 333 U. S. 483 (1948), or the judicial fashioning of procedures for the imposition of criminal punishments, United States v. Jackson, 390 U. S. 570 (1968).[23] Under the rule of law guaranteed by Due Process, the creation of criminal sanctions is, quite simply, "no part of [judges'] . . . duties." United States v. Reese, 92 U. S. 214, 221 (1875).

The question here is whether the North Carolina Supreme Court has infringed that principle, or whether the state-law characterization of what was done in Waddell as a mere application of severability doctrine saves palpable judicial promulgation of the harshest penalty known to mankind[24] from the constitutional

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23/ "It is one thing to fill a minor gap in a statute -- to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." Id. at 580.

24/ See the opinion of Mr. Justice Sharp, dissenting in State v. Waddell, 282 N.C. 431, ___, 194 S.E.2d 19, 48 (1973):

> "This Court, which has consistently deplored the encroachment of other courts upon the legislative prerogatives during the past decade, now follows suit and sets its own example of judicial overreaching by changing the penalty for rape, first degree murder, arson and first degree burglary 'from death or life imprisonment in the discretion of the jury to mandatory death.'"

charge of lawlessness. The question is not, of course, whether four or three Justices of the North Carolina Supreme Court more nearly guessed what the North Carolina legislature might have wanted in the wake of Furman, in light of the fact that its last pronouncement on the subject -- a quarter-century old -- was long sealed together with the irremediable fates of those who had been chosen to live or to die under the discretionary sentencing regime for which it then unmistakably opted.[25/] Rather the question is whether judicial fiat, with nothing more than the profession of that kind of guesswork to connect it with the regular and accepted method of providing by law for the punishment of crimes, can withstand scrutiny under federal constitutional guarantees designed as limitations upon the lawless exaction of overbearing and unauthorized criminal penalties.

25/ State v. Waddell, 282 N.C. 431, ____, 194 S.E. 2d 19, 26 (1973); State v. Mathis, 236 N.C. 508, 53 S.E.2d 666 (1949); and see note 12, supra.

C. The Perpetuation of Arbitrary Discretion in the Selection of Those Who Must Die.

The third issue presented is whether the capital trial procedure approved for North Carolina by the Waddell decision violates Furman's prohibition of arbitrary selectivity in the administration of the death penalty. Although the prevailing opinions in Furman differ somewhat regarding the questions left unanswered by the Furman holding, they all condemn at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by irregular and erratic selective processes.[26/] The form of those

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26/ The concurring Furman opinions of Mr. Justice Brennan (408 U.S. at 257-306) and Mr. Justice Marshall (408 U.S. at 314-374) shared the view that the death penalty is unconstitutional per se, regardless of the presence or absence of discretion in the procedural system whereby it is applied.

Mr. Justice Douglas did not reach the question "[w]hether a mandatory death penalty would . . . be constitutional," 408 U.S. at 257, but held the death sentences under review in Furman and companion cases unconstitutional under the Eighth and Fourteenth Amendments because they were the result of a procedure which discriminated against certain defendants upon the basis of "race, religion, wealth, social position [and] class" and which "[gave] room for the play of such prejudices." 408 U.S. at 242.

Mr. Justice Stewart found it "unnecessary to reach the ultimate question [whether "the infliction of the death penalty is constitutionally impermissible in all circumstances"], 408 U.S. at 306, since he found that the death sentences under review were "wantonly and . . . freakishly imposed," 408 U.S. at 310, and therefore in violation of the Eighth and Fourteenth Amendments. "[O]f all the people convicted of rapes and murders . . . , many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-310 (footnote omitted).

Mr. Justice White declined to consider the question of whether "the death penalty is unconstitutional per se," 408 U.S. at 311, and held only that capital punishment was unconstitutional when it "is exacted with great infrequency even for the most atrocious crimes and . . . [when] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313.

processes can hardly be thought constitutionally dispositive. See Commonwealth v. A Juvenile, 1973 Mass. Adv. Sh. 1199, 300 N.E.2d 434 (1973).[27] What is important is their result: a lawless and capricious dispensation of life and death, in which death sentences are "freakishly imposed." Furman v. Georgia, supra, at 310 (Mr. Justice Stewart, concurring).

In considering whether the Waddell procedures comply with Furman or whether the North Carolina Supreme Court has merely displaced the focus, lowered the visibility, diffused the responsibility, and thereby increased the predictable arbitrariness and discrimination of persisting discretionary processes for the administration of the death penalty,[28] this Court will

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27/ In this case, the Supreme Judicial Court of Massachusetts ruled that Furman invalidated a death sentence under a "mandatory" death penalty statute, if arbitrary procedures made it possible for some defendants to escape being subjected to the extreme punishment. The Court held that when a juvenile could be adjudicated either as an adult for rape-murder (in which case, the death sentence was "mandatory" under Mass. Gen. Laws Ann. c.265 §2) or as a juvenile (in which case no death sentence could be imposed), a death sentence imposed pursuant to the adult "mandatory" statute could not be affirmed, since Furman invalidated "discretionary imposition of the death sentence," 300 N.E. 2d at 442 (emphasis in original), regardless of where in the process this discretion was lodged.

28/ The discretion which is concealed but inevitable in a purportedly "mandatory" death-sentencing system is likely to be influenced by impermissible considerations to at least as great an extent as the visible discretion that Furman found unconstitutional. North Carolina's experience with a "mandatory" statute prior to 1949 reflects this point. Between 1910 and 1949, 75% of all persons received under sentence of death were non-white; between 1950 and 1972, 63% of those so received were non-white. Similarly, 80% of persons executed under the pre-1949 "mandatory" system were non-white; 73% of executions under the post-1949 "discretionary" system were of non-whites. (Data compiled from BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3, (North Carolina Office of Corrections, September

want to consider the following characteristics, among others, of North Carolina law and practice:

28/ cont'd.

1973)). It appears that under the "mandatory"system created by the Waddell decision similar forces are at work: as of June 1, 1974, 24 of the 34 defendants condemned to die for crimes committed between January 18, 1973 (the date of Waddell) and April 8, 1974 (the effective date of the new North Carolina capital punishment statute), or 71%, are non-white, approximately the percentage of those condemned to die who were non-white under the pre-Furman "mandatory" system. Death sentences have been affirmed or imposed under the Waddell procedures in the following cases:

State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974); State v. Dillard, 285 N.C. 72, 203 S.E.2d 6 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd __ N.C. __ , 203 S.E. 2d 786 (April 10, 1974); State v. Monk, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Britt, Robeson County Superior Ct., No. 73-Cr-6567 (September 6, 1973), rev'd ___ N.C. ____, ___S.E.2d ___, N.C. Sup. Ct. No. 36 (Robeson) (May 15, 1974); State v. Spicer, New Hanover County Superior Ct., No. 73-Cr-8034 (September 12, 1973), rev'd ___ N.C. ___, ___S.E.2d ___, N.C. Sup. Ct. No. 25 (Hanover) (May 15, 1974); State v. Ward, Edgecombe County Superior Ct., No. 73-Cr-6706 (September 19, 1973); State v. Fowler, __ N.C. __ , 203 S.E.2d 803 (1974); State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974); State v. Bell, Robeson County Superior Ct., No. 73-Cr-12351 (October 18, 1973); State v. Sparks, Guilford County Superior Ct., No. 73-Cr-19776 (November 1, 1973); State v. Anthony Carey, Mecklenburg County Superior Ct., No. 73-Cr-46179 (November 8, 1973); State v. White, Alamance County Superior Ct., No. 73-Cr-12672 (December 6, 1973); State v. Brown, Edgecombe County Superior Ct., No. 72-Cr-7238 (December 9, 1973); State v. Hines, Edgecombe County Superior Ct., No. 73-Cr-7239 (December 9, 1973); State v. Walston, Edgecombe County Superior Ct., No. 73-Cr-7378 (December 9, 1973); State v. Albert Carey, Mecklenburg County Superior Ct., No. 73-Cr-6158 (December 11, 1973); State v. Vick, Beaufort County Superior Ct., No. 73-Cr-5687 (December 12, 1973); State v. Lampkins, Forsyth County Superior Ct., No. 73-Cr-43023 (January 19, 1974); State v. Pruitt, Cumberland County Superior Ct., Nos. 73-Cr-35545, 35546 and 35548 (January 29, 1974); State v. Williams, Wake County Superior Ct., No. 73-Cr-32521 (January 31, 1974); State v. Woods, Catawba County Superior Ct., Nos. 73-Cr-20546 and 20545 (January 28, 1974); State v. Patterson, Forsyth County Superior Ct., No. 73-Cr-22457 (February 5, 1974); State v. McCall, Transylvania County Superior Ct.,Nos. 73-Cr-1828 and 1829 (February 9, 1974); State v. Avery, Bertie County Superior Ct., No. 73-Cr-2247 (February 17, 1974);

1. Prosecutorial Discretion.

In North Carolina, the Solicitor is charged with the duty to "prepare the trial dockets [and] prosecute in the name of the State all criminal actions requiring prosecution in the superior and district courts of his district," N.C. Gen. Stat. §7A-61 (1971 Cum. Supp.). He is thereby given broad and essentially unreviewable authority to initiate and terminate prosecutions, State v. Loesch, 237 N.C. 611, 75 S.E.2d 654, 656 (1953), including not only absolute discretion whether and what to charge, but also absolute discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment, State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971); and see State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951). The North Carolina courts steadfastly refuse to review prosecutorial decisions. The leading case is State v. Casey, 159 N.C. 472, 74 S.E. 625 (1912), where an appellant, prosecuted and convicted for second degree murder by poisoning, argued that

28/ cont'd

State v. McLaughlin, Robeson County Superior Ct., Nos. 73-Cr-18024, 74-Cr-228, 74-Cr-229, 74-Cr-230, 74-Cr-231, 74-Cr-232 (February 28, 1974); State v. Burns, Onslow County Superior Ct., No. 74-Cr-1012 (March 1, 1974); State v. Bock, Moore County Superior Ct., No. 73-Cr-6324 (March 8, 1974); State v. Armstrong, Harnett County Superior Ct., No. 73-Cr-10951 (March 21, 1974); State v. Vinson, Wilson County Superior Ct., No. 73-Cr-9325 (March 27, 1974); State v. Silver, Nash County Superior Ct., No. 74-Cr-192 (April 4, 1974).

there was no evidence of this crime; that she was either guilty of first degree murder or not guilty of any offense. The Court rejected this contention, commenting that "if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain." 74 S.E. at 625. And the majority opinion in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721, 742 (1974), flatly rejected the contention that either the Eighth or the Fourteenth Amendment required any limitation of the unfettered discretion of the Solicitor: "the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike."

Without any guidance whatsoever, then, a Solicitor is free to make the decision whether an indictment will be sought for first or second degree murder, for rape or assault to rape. He may thus "without violating [his] trust or any statutory policy . . . refuse to [seek] the death penalty no matter what the circumstances of the crime." Furman v. Georgia, supra, at 314 (Mr. Justice White concurring). This prosecutorial discretion doubtless accounts in considerable part for the striking fact, for example, that there have been only two convictions[29/] for

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29/ State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd ___ N.C. ___, 203 S.E.2d 786 (April 10, 1974). State v. Henderson, Alamance County Superior Ct., No. 73-Cr-7771 (September 5, 1973), aff'd 285 N.C. 1, 203 S.E.2d 10 (March 13, 1974), petition for cert. filed, June, 1974 (No. 73-). The petitioner in Henderson was also convicted and sentenced to die for the crime of rape.

first degree burglary during the past year of Waddell's implementation in a State where there were about forty convictions annually for this crime in the recent past,[30] and where 39,210 "burglaries and housebreakings" were reported in 1972.[31] The conclusion is inescapable that Solicitors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary prosecutions despite clear evidence of this crime.

A recent death penalty case, where the conviction and sentence were vacated and a new trial ordered because of procedural error, illustrates the Solicitor's charging discretion under the regime of Waddell. In State v. Spicer, N.C. Sup. Ct., No. 25 (New Hanover), decided May 15, 1974, two persons were tried and convicted for murder during the course of an armed robbery.[32] A third person, one Brailford, had helped plan the

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30/ In 1955, the North Carolina Department of Justice ceased keeping separate statistics for persons convicted of First Degree Burglary and Second Degree Burglary. The Biennial Report of the Attorney General, Vol. 32 at 515, reveals that in 1952, there were 47 convictions for First Degree Burglary (with 15 "Other Dispositions" of First Degree Burglary charges); in 1953, there were 33 convictions for this crime, with 10 "Other Dispositions," ibid.; in 1954, there were 35 convictions and 26 "Other Dispositions," ibid., Vol. 33 at 377.

31/ FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 1972 (Aug. 1973) at 74. The FBI Uniform Crime Report statistics reflect reported crimes, not convictions, and the reported "burglaries and housebreakings" are not necessarily equivalent to the total number of statutory First Degree Burglaries which occurred in the State during 1972.

32/ The conviction of Isaac Monk, also found guilty of first degree murder and sentenced to death in this incident, is pending on appeal in the North Carolina Supreme Court. Monk v. State, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973).

robbery and was to share in its proceeds, but he was not charged in the murder although his testimony "permitted the jury to make a finding that he was an accomplice either in the robbery or the murder, or both." Id., slip op. at 9. The Court thus described Brailford's role in the crime:

> "[T]he State's witness Brailford made the admission to the officers, 'I stated that I initiated the proposition concerning the hit of Christian Brothers Poultry. It was my idea.' He again stated that he expected his cut . . . . The evidence discloses that the witness Brailford originated the plan to rob his employer and explained the setup at the plant."

Id., supra, at 10-11.

2. Plea Bargaining.

Under the Waddell procedures, there is no limit on the power of a Solicitor to accept a plea of guilty to a lesser included offense by a defendant charged with a capital crime, or to nol pros a capital indictment entirely. It is unclear how much plea bargaining in capital cases occurs in North Carolina,[33/] but the critical point is that it is utterly unregulated: the discretion of a Solicitor to accept a plea to a lesser offense in a capital case being quite as untrammelled as the freedom of a jury to recommend mercy in a pre-Waddell capital case. One instance of that discretion is State v. Wiggins, Bertie County Superior Ct., No. 73-Cr-2383, in which a 14 year old defendant was indicted for the rape of a nine year old girl, a potentially capital offense. On February 19, 1974, the defendant was permitted to enter a guilty plea to charges of assault with intent to rape and of assault with intent to kill, and received sentences of fifteen years and five years.

33/ Guilty pleas are said to account for up to 90% of all criminal convictions in the United States. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

Such cases doubtless reflect the long-recognized function of plea bargaining under a purportedly "mandatory" sentencing statute: it "provides the opportunity to individualize justice . . . . Certain mandatory provisions of the statutes which in a particular situation seem unduly harsh may be avoided and a punishment selected which is best suited to the defendant who has already acknowledged his guilt."[34/]

34/ Heath, "Plea Bargaining -- Justice Off the Record," 9 WASHBURN U.L. REV. 430, 455 (1970).

3. Jury Discretion

Even when a North Carolina jury has no admitted sentencing discretion, it still retains power to spare a capital defendant's life by finding him guilty of a lesser included offense. If there is any evidence to support the finding of such an offense, a defendant may demand a lesser-included-offense instruction as a matter of right.[35] N.C. Gen. Stat. §15-170 provides that:

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of any attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime . . . ."

35/ "If . . .there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court under appropriate instructions to submit that view to the jury." State v. Knight, 284 N.C. 384, 391, 103 S.E.2d 452, 456 (1958)(quoting State v. Spivey, 12 N. C. 676, 686, 65 S.E. 995, 999 (1909)); State v. Childress, 228 N.C. 208, 45 S.E.2d 42 (1947). If there is no evidence at all that a defendant was guilty of a lesser included offense, a defendant may not be able to demand such a charge as a matter of right, State v. Hicks, 241 N.C. 156, 84 S.E.2d 545, 547 (1954); State v. Dubcise, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Rosemon, 279 N.C. 573, 184 S.E.2d 289 (1971); State v. Griffin, 280 N.C. 142, 185 S.E.2d 149 (1971); State v. Brown, 227 N.C. 383, 42 S.E.2d 402, 404 (1947); State v. Cox, 201 N.C. 357, 160 S.E. 358, 360 (1931), and a trial judge has discretion to charge that a defendant is either guilty of the capital crime or not guilty of any crime. State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955); State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, 642-643 (1972); State v. Beard, 207 N.C. 673, 178 S.E. 242 (1935); State v. Satterfield, 207 N.C. 118, 176 S.E. 466 (1934). However, if such a charge is given and if a defendant is convicted of the lesser included offense, the conviction will nevertheless be affirmed on appeal, even if it appears irrational on the facts of the case. See State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), and discussion, infra.

And N.C. Gen. Stat. § 15-169 provides that:

> "[o]n the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such a finding . . . ."

The right to a lesser-included-offense charged is considered so important in North Carolina that its omission is held to be reversible error even when the defendant fails to request such a charge. State v. Wagoner, 249 N.C. 637, 107 S.E.2d 63 (1959); State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970). See State v. Moore, 275 N.C. 198, 166 S.E.2d 652, 661 (1969); State v. DeGraffenreid, 223 N.C. 461, 27 S.E.2d 130, 132 (1943). The Supreme Court of North Carolina has frequently reversed convictions for capital offenses[36/] because the trial court failed to give a charge on second degree murder,[37/] voluntary

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36/ The rule in North Carolina is that "the judge's failure to submit the question of defendant's guilt of the lesser included offense is not cured by a verdict convicting the defendant of the highest offense charged in the bill," State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

37/ State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928); State v. Perry, 209 N.C. 604, 184 S.E. 545 (1936); State v. Cause, 227 N.C. 26, 40 S.E.2d 463 (1946); State v. Knight, 284 N.C. 384, 103 S.E.2d 452 (1958). When the State attempts to prove "Willful, deliberate and premeditated killing," N.C. Gen. Stat. § 14-17, which did not occur during the course of a felony and was not committed by poison or lying in wait, the jury may decline to return a first degree verdict and convict instead for second degree murder, since "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first degree or second degree," N.C. Gen. Stat. § 15-172, and since "the jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant." State v. Todd, 264 N.C. 524, 529, 142 S.E.2d 154, 158 (1965). See also, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

manslaughter,[38] or involuntary manslaughter[39] in first degree murder cases, or because it failed to charge on assault with intent to rape in rape cases.[40]

Moreover, a jury may be charged on a lesser included offense where there is no evidence to support such a charge, and a conviction for the lesser offense will be sustained on appeal.[41]

38/ State v. Merrick, 171 N.C. 788, 88 S.E. 501 (1916); State v. Robinson, 188 N.C. 784, 125 S.E. 617 (1924); State v. Manning, 251 N.C. 1, 110 S.E.2d 474 (1959). Cf. State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

39/ State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971). Cf. State v. Denny Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

40/ State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923). See also, State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957); State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951); State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Webb, 20 N.C. App. 199, 200 S.E.2d 840 (1973). Cf. State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 116-118 (1972) (Bobbitt, CJ, dissenting). "An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape." State v. Green, 246 N.C. 717, 100 S.E.2d 52, 54 (1957).

41/ The Supreme Court of North Carolina has occasionally disapproved of this practice, State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 114 (1972); State v. Allen, 279 N.C. 115, 181 S.E.2d 453, 457 (1971); State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 741 (1943), but it has never reversed a conviction of a lesser included offense on the ground that there was no evidence to justify submitting such an offense to the jury.

State v. Robertson, 210 N.C. 266, 186 S.E. 247 (1936); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917). In State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), for example, the appellant, who had been convicted of second degree murder, claimed that an indictment for murder by poisoning necessarily implied that he was either guilty of first degree murder or innocent of any crime. The Court affirmed, stating that such a conviction was within the power of the jury, 55 S.E. at 343, and that "whatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense." 55 S.E. at 344. In State v. Quick, 150 N.C. 820, 64 S.E. 168, 170 (1909), the Court held that the giving of a manslaughter charge in a first degree murder case had been proper:

> "Suppose the court erroneously submitted to the jury a view of the case not supported by evidence whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the state, and not to him." 42/

42/ "An error on the side of mercy is not reversible . . . ." State v. Fowler, 151 N.C. 731, 66 S.E. 567 (1909). Accord: State v. Rose, 155 N.C. 436, 71 S.E. 332, 337 (1911). See also State v. Ratcliff, 199 N.C. 9, 153 S.E. 605, 606 (1930); State v. Johnson, 218 N.C. 604, 12 S.E.2d 278, 288 (1940); State v. Vestal, 283 N.C. 249, 195 S.E.2d 297, 299-300 (1973); State v. Hall, 214 N.C. 639, 200 S.E. 375 (1939).

In State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 740 (1943), the Court declared:

> "If we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then . . . [and] [w]hen they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

To insure that the jury is aware of the consequences of its decision in a capital case, the Supreme Court of North Carolina recently ruled that if "the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence . . . sufficient compelling reason exists to justify . . . informing the jury of the consequences of their possible verdicts." State v. Britt, N.C.Sup.Ct., No. 36 (Robeson), decided May 15, 1974, [Appendix D, infra] slip op. at 16. The Court also ruled that "[c]ounsel may, in his argument to the jury, in any cse, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged . . . .[He may] in his argument to the jury . . . . inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge." Id. at 17-18. This holding implements the power of the jury to avoid imposing the death penalty in a

sympathetic case, either by convicting of a lesser included offense or by returning a verdict of not guilty.[43/] Thus, under North Carolina law, a double level of discretion may affect the jury's choice of a life or death verdict in a case where all the evidence points to guilt of a capital offense or of nothing: the trial judge has discretion to submit such lesser offenses, and the jury has discretion to commit for them.

43/ Wicker, "Christmas on the New Death Row," New York Times, Dec. 25, 1973, p. 18, col. 1:

> "Raleigh, N.C. Dec. 24 . . . In January, 1973, the North Carolina Supreme Court ruled that the Federal Supreme Court had made it unconstitutional for a jury to recommend mercy, hence life imprisonment rather than death, for an arbitrary number of those convicted of first-degree murder, arson, rape or burglary; . . . Around here, some are still heaving sighs of relief at the case of a black man charged with breaking into a house and stealing about $10 worth of food. The house was occupied, the break-in occurred at night, so the offense was first-degree burglary. Perhaps influenced by the only alternative available, the jury acquitted him, thus sparing him Christmas on the new Death Row but raising the question how mandatory death sentences can be considered an improvement on cruel and unusual punishment."

4. Executive Clemency.

The North Carolina Constitution provides that:

> [T]he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons. Article III, §5(6).

Governors of the State have, by the exercise of this clemency power, spared the lives of a substantial proportion of condemned prisoners. Between 1903 and 1963, the sentences of two hundred thirty-five (235) of three hundred fifty-eight (358) condemned prisoners were commuted. The chief executive has thereby commuted 65.6 percent of the death sentences imposed in the State over a sixty year period.

The Governor's discretion to spare the lives of condemned felons is absolute. The Constitution reserves to the legislature the right to prescribe the "manner of applying for pardons" but leaves the grant or denial subject only to "such conditions as [the Governor] may think proper." Indeed, the Court of Appeals has said with regard to the analogous executive power to grant paroles (a power originally conferred upon the Governor by Article III) that:

> [i]n a matter which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves a large number of intangibles, rigid guide lines are neither necessary nor desirable. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, 792 (1971).

Under a procedural system in which the death penalty is purportedly "mandatory," the clemency authority has commonly functioned as the aspect of the criminal jutice system that responds to "mitigating factors" -- factors which, while insufficient to justify a verdict of not guilty, are nevertheless viewed by society as meriting some mercy in the exaction of punishment. 44/ A 1957 study of the imposition of capital punishment in North Carolina noted a pronounced decline in the number of commutations or death sentences after the 1947 and 1949 statutory amendments giving juries the option of imposing life sentences for the four crimes which had theretofore carried mandatory death penalties. 45/ By withdrawing that option from juries in 1973, the Waddell decision obviously displaced, but equally obviously did not reduce, the operation of discretionary selectivity in North Carolina's death-sentencing practices.

44/ Note, Executive Clemency in Capital Cases, 39 N.Y.U.L.REV. 136, 165-166 (1964).

45/ Johnson, Selective Factors in Capital Punishment, 36 SOCIAL FORCES, 165, 166-7 (1957). Behre notes that while 64 percent of condemned persons escaped execution between 1910 and 1948, the percentage of those escaping execution dropped to 38 percent for the period between 1949 and 1962. Undoubtedly, a large proportion of condemned persons who avoided the death penalty did so by commutation. BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3. (North Carolina Office of Corrections, September 1973).

D. The Inconsistency Of The Death Penalty With Contemporary Standards of Decency

Eighth Amendment standards are not static, and the prohibitions of the cruel-and-unusual punishment clause are not "confine[d] . . . to such penalties and punishments as were inflicted by the Stuarts." Weems v. United States, 217 U. S. 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Id. at 378, and informed by "the light of contemporary human knowledge." Robinson v. California, 370 U. S. 660, 666 (1962). There was no disagreement among the Justices who reached the issue in Furman v. Georgia that this evolutionary standard authorized the periodic Eighth Amendment re-evaluation of hoary criminal punishments. See Furman v. Georgia, supra, at 242 (opinion of Mr. Justice Douglas); at 264-269 (opinion of Mr. Justice Brennan); at 325-328 (opinion of Mr. Justice Marshall); at 383 (opinion of Mr. Chief Justice Burger); at 409 (opinion of Mr. Justice Blackmun); at 429 (opinion of Mr. Justice Powell). Such a re-evaluation of the penalty of death is particularly appropriate at this historical juncture, for three principal reasons:

First: The cruelty and inutility of the death penalty are apparent in an age when "contemporary human knowledge," draws upon advanced medical science and sciences of human behavior. We are no longer so uninformed about the complex sources and motivations of anti-social behavior as to maintain the simplistic and beguiling notion that the threat of death deters serious crime; nor can we ignore today the the truism that government remains "the potent, the omnipresent teacher" [46/] even when it chooses to

46/ Olmstead v. United States, 277 U. S. 438, 485 (1928) Justice Brandeis, dissenting).

teach the overriding lesson of capital punishment "'that a man's life ceases to be sacred when it is thought useful to kill him.'"[47] While we have not abandoned the essential moral and social proposition that the citizen is responsible to society for his or her conduct, new knowledge of the subtle springs of human behavior has led to a reconsideration of the justifications for retributive punishments,[48] a partial diminution of retributive sentiment, and a guarded, but increased optimism about the possibilities of rehabilitation. At the same time, society has developed sophisticated means for safely isolating dangerous criminal offenders.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterrent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, reinforce moral standards of (if retribution

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47/ Camus, Reflections on the Guillotine, in CAMUS, RESISTANCE, REBELLION AND DEATH 173, 229 (1961).

48/ ". . . a cloud of doubt has settled over the keystone of 'retributive' theory. Its advocates can no longer speak with the old confidence that statements of the form 'This man who has broken a law, could have kept it' had a univocal or agreed meaning; or where scepticism does not attach to the meaning of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this form is true from those where it is not." H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968), at 1.

is considered a legitimate aim of penal sanctions) a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision made below by a single vote of the North Carolina Supreme Court: to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human life."[49] Mr. Justice White wrote in Furman that:

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment." 408 U. S. at 312.

At a time when the death penalty is and inevitably will continue to be rarely imposed, and when empirical data fail to substantiate that its imposition is "of substantial service to criminal justice" (id. at 313) in any case, the question is squarely presented whether death as a punishment for crime is consistent with any morality that our society can forthrightly accept.

Second: The rarity with which the death penalty is imposed today signifies repudiation of its regular use. The Court in Furman confronted an accepted system which sent an exceedingly small number of persons[50]--who were, for the most part, members of

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49/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 291 (1971).

50/ "The most salient characteristic of capital punishment is that it is infrequently applied . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND

powerless or despised minorities--to die in secret for crimes punished less severely in the vast majority of cases.[51]

> "[T]oday society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute." Furman v. Georgia, supra, at 300 (Brennan, J. concurring).

The Furman majority rightfully looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "The objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U. S. at 300 (emphasis added). A punishment which is tolerated only because it is rarely imposed, or because the facts and circumstances surrounding its imposition and the evidence of its inutility are generally unknown, or because it is imposed only upon the powerless and members of outcast groups, is not a punishment consistent with contemporary morality. Even in those states which have enacted new capital punishment legislation since Furman, the imposition of the

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50/ (Cont'd)
ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), p. 143.
The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Of the 3,859 persons executed under civil authority in the United States between 1930 and 1968, only 191 were executed during the 1960's and only 25 were executed after 1963. No one has been executed in the United States since 1967. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 (August 1970).

51/ Justice Douglas quoted the conclusion of the President's Commission on Law Enforcement and Administration of Justice that "'the death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.'" Furman, supra, at p. 249. See also the concurring opinions of Justice Stewart, at p. 310, and Justice Marshall, at pp. 364-366. Justice Marshall noted that "American citizens know almost nothing about capital punishment." Indeed, ignorance of the details of execution is insured by law in that every American jurisdiction now

death penalty remains, and must continue to remain, a freakishly rare occurrence. Indeed, even in the State of North Carolina, where for fourteen months a purportedly "mandatory" death sentence was put into effect for four relatively common crimes, the number of death sentences was so low that it is impossible to conclude that the penalty was being in a fraction of the cases to which it was theoretically applicable. The legitimacy of its application in a manner which no honest mind can doubt will continue to be freakishly rare in this country--if it continues at all--is therefore called into question.

Third: The growing reluctance to allow the state to take the life of any human being and the absolute refusal to require or tolerate general application of the death penalty reflect not only an increased awareness of the inutility of the punishment, but also a moral development which has produced an increased respect for life and a concommittant revulsion against inflicting the physical and psychological torture of condemnation, inevitably lengthy death row confinement and execution.[52] Increased respect for

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51/ (Cont'd)

forbids public executions. Movements to Abolish the Death Penalty in the United States, 284 ANNALS 124, 127-130 (1952).

52/ ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." SELLIN, THE DEATH PENALTY (1959) 15.

life and increased respect for the dignity of man inevitably increase the awesomeness of the notion of condemnation and execution. Thus executions, which were once routine occurrences, had ceased for a period of five years even prior to Furman as this nation agonized over the prospect of their resumption and over the inevitable and sobering possibility that human error or a denial of due process could send a man to his death.[53/]

The enormity of the process forbids its resumption without the prior judgment of this Court. If, after a lapse of seven years, the United States is going to return to killing people, this Court should first consider under the relevant Eighth Amendment standards all that that implies.

It is incontrovertible that an impending execution inflicts severe psychological anguish and mental pain upon a condemned man.

Under a legal system which postpones execution for periods measured in years in an attempt to assure its conformity with due process of law, the wait between the imposition of sentence and the actual infliction of death exacts a severe toll.

As the California Supreme Court has pointed out,"the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 894 (1972).

53/ See Black, "The Crisis in Capital Punishment" 31 MD. L. REV. 290, at 295-300 (1971).

The condemned prisoner, even more than the expatriate, is subjected to the "fate of ever-increasing fear and distress." Trop v. Dulles, 356 U. S. 86, 102 (1958) (plurality opinion of Chief Justice Warren). The stress of awaiting execution frequently produces insanity, see Solesbee v. Balkom, 339 U. S. 9, 14 (1950) (Justice Frankfurter, dissenting), or other extreme manifestations of psychological compensation.

Moreover, existing data suggests what imagination intuits: there is likely to be unmeasurable physical pain before consciousness is lost. "Although our information is inconclusive, it appears that there is no method available that guarantees an immediate and painless death." Furman v. Georgia, supra, at 287 (Mr. Justice Brennan concurring).

And there is, finally the enormity and irreversibility of the act of condemning and terminating a human existence -- an act which denies absolutely the very thing which the Eighth Amendment was created to protect: the dignity of man.

The moral development which has accompanied advances in understanding of the causes and control of crime and which is reflected in the increasing world-wide disinclination to impose the punishment of death calls upon this Court now to consider the question of the legitimacy of that punishment under the Eighth Amendment's measure: "the evolving standards of decency that mark the progress of a maturing society."[54/]

54/ Trop v. Dulles, 356 U. S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE ARBITRARY REFUSAL OF THE NORTH CAROLINA COURTS TO PERMIT HIS COUNSEL TO INFORM THE TRIAL JURY THAT A VERDICT OF CONVICTION ENTAILED A SENTENCE OF DEATH, WHEN THE JURY WAS NOT OTHERWISE INFORMED THAT LIFE OR DEATH HINGED ON ITS VERDICT.

At the close of the evidence in this case, petitioner moved "that he be allowed to argue the question of punishment in final summation," R. 13, and this motion was denied. The trial court stated that "the amount of punishment which the verdict of guilty will empower the judge to impose is . . .[of] no concern to the jurors."[55/] The Supreme Court of North Carolina affirmed this ruling: "The punishment to be imposed not being a matter to be determined by the jury, defendant's counsel was not entitled to argue this question to the jury." 203 S.E.2d at 9 (App. A at 4a).

In a case decided two months later, however, the North Carolina Supreme Court held in State v. Britt, No. 36 (Robeson

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55/ Transcript, State v. David Earl Dillard, Robeson County Superior Ct. No. 73-Cr-5807 (Aug. 1, 1973) at 110. This comment does not appear in the "narrated"Statement of Case on Appeal. See note 3 supra. The record does not reveal that any questions were asked concerning capital punishment during jury selection or that the death penalty was mentioned during the course of the trial.

County)(May 15, 1974), App. D. at 1d-18d,[56/] that there are sufficient state-law reasons for the jury to be "informed", slip op. at 16 (App. D at 16a), of the consequences of its verdict in a post-Waddell death case. The Court ruled that where the jury was "confused or uncertain"as to the punishment which could be imposed upon a defendant convicted of a crime entailing the death penalty, the trial court was obliged to instruct the jury as to the consequences of its verdict:

56/ The appellant in Britt had been indicted for first degree murder. The trial court had charged the jury that it could return a verdict finding appellant guilty of involuntary manslaughter, voluntary manslaughter, second degree murder, or first degree murder, but it had not informed the jury of the punishments which would be imposed upon conviction of these offenses. The jury returned a verdict of "First-degree murder, with mercy", slip op. at 12 (App. D at 12d). The trial judge refused to accept the recommendation of punishment and imposed the death sentence mandated in such cases by State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), ruling that:

> "This is not a possible verdict. The verdict must be either guilty of murder in the first degree or guilty of whatever you find him guilty of. The Court will not accept the recommendation of the Jury as to punishment in the matter, for punishment is entirely for the Court."

Slip opinion at 12 (App.D at 12d). Appellant Britt assigned this ruling as error, and the Supreme Court of North Carolina agreed, reversing appellant's conviction and sentence of death and granting a new trial.

> "[I]n a capit l case, there may be a "compelling reason which ikes disclosure as to punishment necessary in rder 'to keep the trial on an even keel' and to nsure complete fairness to all parties . . ." Thus in a capital case if the jury appears to be confused or uncertain, the trial judge should act to alleviate such uncertainty or confusion. Specifically, if the trial judge observes that the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence, in our opinion, sufficient compelling reason exists to justify his informing the jury of the consequences of their possible verdicts.
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> In [sic] instant case, when the jury returned a verdict of "first degree murder, with mercy", it became apparent that the jurors were confused as to the law and as to their duties as jurors. At this point the trial judge should have informed them that under existing laws, neither the jury nor the Court had any discretion as to punishment if the jury returned a verdict of guilty of first degree murder . . . .[T]he gravity of this case, and the apparent confusion and uncertainty among the jurors . . . demanded more clarification as to possible verdicts than the statement: 'The verdict must be either guilty of murder in the first degree or guilty of whatever you find him guilty of.'"

Slip op. at 16-17 (App.D. at 16d-17d). Failure to inform the jury of the penalty imposed pursuant to a first degree murder conviction was held to be reversible error, and appellant Britt was granted a new trial. The rationale for this rule is apparently that the jury should not be ignorant of the awesome consequences of its decision to convict in a capital trial.

There are ways in which Britt might be distinguished from petitioner's case, but none of them are sufficiently rational to withstand the charge of arbitrariness.[57/] First, it might

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57/ The Supreme Court of North Carolina made an equally unsatisfactory attempt to distinguish State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), pending on petition for certiorari, No. 73- (June 1974), a case in which an appellant had been convicted and sentenced to die for the crimes of rape and burglary. During the course of the jury's deliberations in the

be said that the Britt jury manifested its confusion when it

57/ cont'd.

Henderson trial, the jury foreman returned to the courtroom and stated to the court that the jury "would like further instructions regarding the punishment and whether or not [it could] make a recommendation." State v. Henderson, R. at C. 19. The trial court, which had not informed the jury previously of the possible punishment that could be imposed if a guilty verdict were returned, replied:

> "I will instruct you the penalty to be imposed is really not your concern. Your function is to pass on the guilt or not guilt [sic] as to both counts. So, I will not instruct you on what the penalty will be, that is not a concern of yours. As far as the recommendation is concerned, you cannot make a recommendation. You find him guilty or not guilty according to the evidence and the instructions I have given you."

State v. Henderson, R. at C.19-C.20.

On appeal to the Supreme Court of North Carolina, appellant Henderson urged that the trial court had erred by "[f]ailing to inform jury that verdict of guilty meant death." Brief of Appellant at 2. The court rejected that claim, ruling that

> "[t]he sole responsibility of the jury is to decide the guilt or innocence of the accused without being hindered by the quantum of punishment possible, probable or certain upon conviction . . . . We hold that the trial judge properly refused to instruct the jury as to the punishment which would result from a conviction of rape or first degree burglary." State v. Henderson, 285 N.C. 1, 203 S.E.2d 10, 23 (1974).

In Britt, the court dealt with Henderson in the following oblique fashion: "the trial judge [in Henderson] elected to answer the main inquiry from the jury by explaining to them that they could not make any recommendation. We did not discuss the question of whether such compelling reasons existed as to require disclosure of punishment." State v. Britt, supra, slip op. at 15 (App. D at 15d).

returned an impermissible verdict and that petitioner's jury gave no indication of its ignorance of the penalty for first degree murder. Petitioner's jury, however, was as unaware of the consequences of its first degree murder verdict as was the Britt jury, and it is surely irrational to require some objective manifestation of its lack of knowledge. A jury may simply be too ignorant to appear confused or uncertain. "' Complete fairness to all parties'", State v. Britt, supra, slip op. at 16 (App. D at 16d), requires knowledge of the consequences of a first degree murder verdict in all cases if it does in any.

Second, it might be argued that the jury need be informed of the "mandatory" death penalty only when it is also charged on lesser included offenses of the capital crime. This rationale implies, however, that the jury's guilt determination is influenced by sentencing considerations, a kind of arbitrariness clearly forbidden by Furman v. Georgia, 408 U.S. 238 (1972). See pp. 28-42, supra. Furthermore, since a charge on lesser included offenses unsupported by evidence is not reversible error, see pp. 39-41, supra, such a charge may, at the discretion of the trial court, be given in any case. This means that unless there is a uniform requirement of disclosure of the death penalty in all capital cases, an irrationally defined number of capital juries will be unaware of the awesome consequences of their decision.

Finally, petitioner's request to "argue" punishment might be urged as a justification of the trial court's ruling which kept his jury ignorant of the consequences of its verdict. Indeed, this was the ground upon which the Supreme Court of North Carolina distinguished its ruling in petitioner's case from its ruling in Britt: "there was no error [in petitioner's case] in the Court's ruling that defendant's counsel could not make an argument to the jury upon the question of the punishment to be imposed." State v. Britt, supra, slip op. at 17 (App. D at 17d) (emphasis in original). According to Britt, defense counsel may "read or state to the jury" that the penalty upon conviction is death, id. at 17-18, but he may not "argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely." id. at 18. The trouble with this distinction is that the present record simply will not support the construction that petitioner's request to "argue the question of punishment in final summation," R. 13, implied the kind of argument which Britt forbids. The object of petitioner's motion was to inform the jury of the punishment incident to a verdict of guilty of first degree murder; nothing was said about how this was to be done, except that it would be done in closing argument; and the import of the trial court's ruling on the motion was categorically that petitioner was not to mention the issue of

punishment to the jury. The trial court adopted exactly the position condemned in Britt, when it ruled that the question of punishment is of "no concern to the jurors." In light of the principles announced by the North Carolina Supreme Court in Britt, the jurors' decision in this case was made "upon less than all of the relevant evidence," Jackson v. Denno, 378 U.S. 368, 389, n. 16 (1964), authorized to go to the jury by North Carolina's own law.

The Due Process Clause of the Fourteenth Amendment enforces a basic requirement of consistency, fundamental fairness, and even-handedness in the criminal process. Witherspoon v. Illinois, 391 U.S. 510 (1968); Brady v. Maryland, 373 U.S. 83 (1963); Mempa v. Rhay, 398 U.S. 128 (1967). "Arbitrary action is not Due Process." Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955).[58/] The command of the Due Process Clause is not simply one of notice: regularity is also required, NAACP v. Button, 371 U.S. 415, 433 (1963), and this guaranty extends not only to those "rights" a State is federally compelled to give its citizens, but also to the other benefits a State may choose to give them, however gratuitously. Watson v. City of Memphis, 373 U.S. 526, 533 (1963); Cox v. Louisiana, 379 U.S. 536, 555-558 (1966).

58/ Cf. Landman v. Peyton, 370 F.2d 135, 141 (4th Cir. 1966): "Under our constitutional system, the payment which society exacts for transfression of the law does not include relegating the transgressor to arbitrary and capricious action."

Petitioner has not been accorded an important State-created right, the right to have his jury informed of the consequences of its capital verdict, and the denial to him of this right is purely arbitrary. In its Britt opinion, the Supreme Court of North Carolina ineffectually purports to justify this denial, though the rule of Britt is not announced as a new one but ostensibly as one of long standing. For the Court in Britt emphasized that under the law of North Carolina:

> "Counsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged . . . . [The decision in petitioner's case] did not hold that counsel, in his argument to the jury, cannot inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge."

State v. Britt, supra, slip op. at 17-18 (App. D at 17d-18d). The trial judge's ruling in petitioner's case, however, had exactly the effect of preventing petitioner from informing the jury of the punishment for murder, and a retroactive reformulation of the issues in petitioner's case cannot cure this defect.

This Court has been confronted before by the attempt of a state court to distort an earlier decision by post hoc rationalization in a later one. In Shuttlesworth v. Birmingham, 382 U.S. 87 (1965), the Court reviewed a criminal conviction under an ordinance that had been given a narrowing construction by a state appellate court after its affirmance of petitioner

Shuttlesworth's conviction. In dicta in the later case, the appellate court attempted to justify the Shuttlesworth conviction consistently with its subsequent holding. Middlebrooks v. City of Birmingham, 42 Ala. App. 525, 170 So.2d 424, 426 (1964). Notwithstanding this self-serving interpretation, this Court reversed the conviction in Shuttlesworth, holding "[t]he present limiting construction . . . was not given to the ordinance by the Alabama Court of Appeals . . . until its decision in Middlebrooks, supra, . . . after the petitioner's conviction in the present case." 382 U.S. at 91-92.

If a conviction and sentence for blocking the sidewalk must be reversed when a later judicial interpretation ineffectually attempts to conceal their arbitrariness by untenable rationalizations, petitioner's conviction and sentence of death must surely also be reversed. The distinction that petitioner moved to "argue" punishment rather than to "state" the punishment to the jury is simply too insubstantial for use in a case where life is at stake. Nothing in this record indicates that petitioner sought to argue punishment in any other sense than that of informing the jury of the consequences of its verdict, as Britt allows. Refusal of that same allowance to petitioner is therefore wholly arbitrary: "[d]ue process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." Chambers v. Florida, 308 U.S. 227, 241 (1940).

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

APPENDIX A

Opinion of the Court Below

Cherry for $10,404.87 plus interest and costs, and that this judgment would become final unless Cherry answered within ten days and showed that it was not indebted to Bouchelle. Despite this notice Cherry's president and owner did nothing when originally informed of the garnishment proceeding except contact Mr. Bouey of Lawyers Title Company, who in turn apparently did nothing with respect to plaintiff's proceeding. When notice of the conditional judgment was served on him, again Mr. Cherry ignored the notice and did nothing. It is difficult to understand how an experienced businessman could be so lax in the conduct of his company's affairs.

The garnishment papers were served on Lyon. He was the son-in-law of W. P. Cherry, Jr., the president and owner of the garnishee. He was 38 years of age with 15 years' business experience, during which time he served as manager of a department store where he had had experience with garnishment proceedings. Mr. Cherry had recently persuaded Lyon to accept a position with his company, and shortly after beginning his employment with Cherry, Lyon was made president of Elmwood Components, a subsidiary of Cherry. On 16 October 1970, the date of the service of the garnishment papers, Lyon had been an employee with Cherry for two months. According to the testimony of both Lyon and the company's bookkeeper, Mr. Ambrose, when Mr. Cherry and Mr. Ambrose were out of the office, Lyon was in charge of the company's office where some 17 other employees worked. When process was served in this case, neither Mr. Cherry nor Mr. Ambrose was in the office. Lyon acknowledged receipt of the process and signed as "purchasing agent" since he had done some purchasing, although usually under the direction of Mr. Cherry. The deputy sheriff who served the papers in question had served other papers on the garnishee over the years by leaving them with the person in charge of the office since Mr. Cherry was rarely in. The company had been sued many times and no question had ever been raised about the process being left with the person in charge.

Lyon testified that he thought he gave the papers to Mr. Cherry or to Mr. Ambrose, but he was not sure. Usually when he received papers for Cherry he would place them on Mr. Cherry's desk since he worked closely with him. Mr. Cherry had never told him that he should not receive suit papers.

Under the circumstances in this case it can reasonably and fairly be implied that Lyon was an agent of Cherry of sufficient character and rank as to afford reasonable assurance that he would, as he in fact did, communicate to his company that process had been served upon him. We hold, therefore, that Lyon was an agent authorized to receive process and that service upon him was valid under G.S. § 1-440.6(a).

The decision of the Court of Appeals affirming the order of Judge Abernethy denying Cherry's motion to strike the final judgment against it is affirmed.

Affirmed.

LAKE, J., dissents.

STATE of North Carolina

v.

David Earl DILLARD.

No. 9.

Supreme Court of North Carolina.

March 13, 1971.

Defendant was convicted in the Superior Court, Robeson County, E. Maurice Braswell, J., of murder, and he appealed. The Supreme Court, Lake, J., held that evidence was sufficient to give rise to a presumption of malice, and that death sen-

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been raised about the process with the person in charge.

stified that he thought he gave s to Mr. Cherry or to Mr. Am- t he was not sure. Usually when ed papers for Cherry he would m on Mr. Cherry's desk since he dealt with him. Mr. Cherry had d him that he should not receive ns.

the circumstances in this case it quite easy and fair to regard that n as an agent of Cherry of sufficient and such as to be afford reasonable e that he would have in fact this notice to the company that process n served upon him. We hold e, that Lynn was an agent author- receive process and that service on was valid under G.S. § 1-97(3).

ecision of the Court of Appeals af- the order of Judge Abernethy de- Cherry's motion to strike the final nt against it is affirmed.

ved.

E, J., dissents.

STATE of North Carolina

v.

David Earl DILLARD.

No. 9.

upreme Court of North Carolina.

March 31, 1971.

efendant was convicted in the Su- Court, Robeson County, E. Maurice ell, J., of murder, and he appealed. Supreme Court, Lake, J., held that nce was sufficient to give rise to a mption of malice, and that death sentence imposed was not prohibited by the Eighth and Fourteenth Amendments.

No error.

Bobbitt, C. J., and Higgins and Sharp, JJ., dissented in part and filed opinion.

1. Criminal Law ⇐1153.14

It would be presumed that court correctly instructed jury on every phase of case with respect to the law and to the evidence where no objection to jury charge was set forth in the record and no assignment of error was directed thereto.

2. Homicide ⇐456

Where undisputed testimony of several eyewitnesses to shooting of deceased clearly identified defendant as the perpetrator of the offense and was sufficient to show that the shooting of defendant's wife was intentional, evidence was sufficient to give rise to a presumption of malice.

3. Criminal Law ⇐718

Defense counsel was not entitled to argue question of punishment to the jury where punishment to be imposed was not a matter to be determined by the jury.

4. Constitutional Law ⇐970

Criminal Law ⇐1213

Death sentence imposed for murder was not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. U.S.C.A.Const. Amends. 8, 14.

By an indictment, proper in form, the defendant was charged with the murder of Mattie Bell Dillard, his wife, and was found guilty of murder in the first degree. Pursuant to the verdict, he was sentenced to death. His three assignments of error are: (1) The denial of his motion for judgment of nonsuit; (2) the denial of his motion that he be permitted to argue to the jury the question of punishment; and (3) the denial of his motion in arrest of judgment. The basis for the motion in arrest of judgment, as set forth in his brief on appeal, is that "the death sentence imposed upon appellant is legally unauthorized and constitutes a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States."

The defendant offered no evidence. The evidence for the State was to the following effect:

On 22 April 1973 (Easter Sunday) at about 7:30 a. m., a witness for the State, whose home adjoined the property of the church attacked by the deceased and occasionally by the defendant, saw the defendant walking around in the church yard carrying a shotgun. At 9:30 a. m. the defendant came to the back door of the home of this witness and talked briefly to her husband. Following that conversation, he walked back toward the front door of the church. He entered the church and was told by the janitor that the church "opened" at 10:00 a. m. but the janitor did not object to his staying in the church and waiting until that time. The defendant, however, left the building to get a drink of water.

At about 10:30 a. m. the defendant was observed by several witnesses sitting in the back of the church; i. e., near the front door. Sunday School exercises had begun and were being conducted in the front portion of the church; i. e., near the pulpit. The deceased, 19 years of age, her one year old baby, her brother, his wife and their two little girls then entered the church and proceeded down the aisle toward the front, where the Sunday School exercises were in progress. The defendant thereupon shot his wife with the shotgun. She fell to the floor of the church aisle and, as she lay there, he reloaded the gun twice and shot her again and again.

The defendant then pointed the shotgun at his brother-in-law who fled from the

church, as did most of the other occupants. As the brother-in-law was fleeing to the home next door to the church, the defendant shot him, the shot striking him in the foot. The brother-in-law and his wife then ran through the house and as they emerged from its front door, the defendant shot again and wounded the wife of his brother-in-law. He then went back toward the church and shot at an automobile in which his parents-in-law appear to have been sitting.

Immediately after their marriage, the defendant and the deceased lived with her parents. Later they separated and he moved out of the home of his parents-in-law. Thereafter, he and his wife became reconciled and then, some three or four weeks prior to the shooting, they separated again, she returning to the home of her parents.

The deceased sustained three shotgun wounds at close range, one in the right side of her face or neck, below the jaw, one in her right arm and one in her right side. Prior to the shooting, she was in good health. Shortly thereafter, when her body was removed from the church for transportation to the hospital by ambulance, she appeared to be dead.

Approximately one hour after the shooting, Patrolman Daniels of the State Highway Patrol was proceeding to the church in response to a call. Half a mile from the church, he met the defendant walking along the road, carrying a shotgun. Patrolman Daniels stopped his automobile. The defendant came up and said that he was the man for whom the patrolman was looking and that he had just killed his wife. Patrolman Daniels took the defendant into his car and carried him to the sheriff's office. He asked the defendant no questions concerning the shooting but, on the contrary, told him to say no more until he talked with the investigating officer. Nevertheless, the defendant continued to talk and stated that "had it not been for his mother-in-law's interference, it wouldn't have happened." At the sheriff's office, Patrolman Daniels delivered the defendant and the shotgun into the custody of Deputy Sheriff Walters.

Deputy Sheriff Walters advised the defendant of his constitutional rights as set forth in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, and offered him the use of a telephone. The defendant stated that he understood his rights. He told Deputy Walters that he had taken the gun into the church under his coat, that he had taken a seat on the back seat of the church, had thrown his coat over the gun and then, when his wife rose to timely prevent him, he had attempted to kill his mother-in-law.

Atty. Gen. Robert Morgan by Asst. Atty. Gen. T. Buie, Groten and Retford, E. Jones, Raleigh, for the State.

McManus & McManus by J. M. McManus, Red Springs, for the defendant.

David E. Kendall, New York City, for NAACP Legal Defense Fund, amicus curiae.

LAKE, Justice.

[1] The judge's charge to the jury is not set forth in the record and no assignment of error is directed thereto. Consequently, it is presumed that the court correctly instructed the jury on every phase of the case with respect both to the law and to the evidence. State v. Pinyatello, 273 N.C. 312, 327, 158 S.E.2d 560; State v. Hines, 266 N.C. 1, 145 S.E.2d 363; Strong's N.C. Index 2d, Appeal and Error, § 42, and Criminal Law, § 158.

[2] The denial of the defendant's motion for judgment as of non-suit was obviously correct. The undisputed testimony of several eyewitnesses to the shooting of the deceased clearly identified the defendant as the perpetrator of the offense and was sufficient to show that the shooting was intentional. Thus, the evidence was sufficient to give rise to a presumption of malice. State v. Bolin, 231 N.C. 417, 189 S.E.2d 235; State v. Duboise, 279 N.C.

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...nels delivered the defendant ...n into the custody of Deputy ...rs.

...iff Walters advised the de... ...s constitutional rights as set ...ida v. Arizona, 384 U.S. 436, ...16 L.Ed.2d 694, and offered ...f a telephone. The defendant ...s understood his rights. He ...Walters that he had taken the ...church in the car, but ... ...got out with the gun and had ...due to family problems, which ...to his conduct in law.

...Robert Morgan, Atty. Gen., ...ale, Deputy Atty. Gen. and Ralford E. ...ell, for the State.

... & McManus by J. M. Mc... ...d Springs, for the defendant.

...Kent, New York City, for ...Legal Defense Fund, amicus ...

Justice.

...e judge's charge to the jury is ...th in the record and no assign... ...rror is directed thereto. Conse... ...is presumed that the court cor... ...structed the jury on every phase ...e with respect both to the law and ...idence. State v. Pigatello, 272 ...2, 127, 158 S.Ed.2d 2d; State v. ...76 N.C. 1, 145 S.E.2d 263; Strong, ...Dex 2d, Appeal and Error, § 42, ...minal Law, § 156.

The denial of the defendant's mo... ...judgment as of non-suit was cor... ...correct. The undisputed testimony ...ral eyewitnesses to the shooting of ...eased clearly identified the defend... ...the perpetrator of the offense and ...fficient to show that the shooting ...tentional. Thus, the evidence was ...ent to give rise to a presumption ...ice. State v. Rohn, 201 N.C. 445, ...E.2d 245; State v. Dubose, 279 N.C. 73, 81, 181 S.E.2d 393. The undisputed evidence further shows that the defendant, armed with a shotgun, went to the church, remained in that vicinity some two and one half hours before the shooting, concealed the gun into the church under his coat and, when his wife entered the church and was proceeding down the aisle, shot her at close range and then fired two more shots into her body as she lay on the floor. Following that, he fired several shots at her relatives as they fled from the scene. Thus, the evidence was ample to support the finding that the murder of his wife was with premeditation and deliberation. As we said in State v. Dubose, supra, 279 N.C. 181, 181 S.E.2d at page 399, "The additional ingredient of premeditation and deliberation necessary in first degree murder may be inferred from the victim's and hostile circumstances of the homicide, *e. g.*, lack of provocation, threats before and during the occurrence, infliction of fatal blows after the victim had been felled and rendered helpless, and conduct of the defendant before and after the killing." There is in this record no evidence whatever of provocation, or that the deceased spoke to or was aware of the presence of the defendant prior to the shooting.

[3] There was no error in the court's ruling that the defendant's counsel could not make an argument to the jury upon the question of the punishment to be imposed. In State v. Waddell, 282 N.C. 431, 445, 194 S.E.2d 19, we said, with reference to the trial of a defendant upon the charge of murder in the first degree, rape, arson or burglary in the first degree:

> "Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge."

The punishment to be imposed not being a matter to be determined by the jury, defendant's counsel was not entitled to argue this question to the jury.

[4] The defendant's third, and last, assignment of error is to the overruling of his motion in arrest of judgment on the ground that the death sentence imposed upon the appellant is not authorized by a constitutionally valid statute of this State, but is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States. Of the seventy-five page brief filed by the defendant in this Court, about three pages are in support of this contention. This portion of the brief is a verbatim copy of the brief filed by the amicus curiae in State v. Jarrette, N.C., 202 S.E.2d 721, decided 25 February 1974. Contrary to the usual practice of this Court, the same amicus curiae was permitted, at the hearing of this appeal, to make a full oral argument in support of its contentions concerning this matter. All of the contentions of this defendant and of the amicus curiae upon this question were carefully considered by us and found to be without merit in State v. Jarrette, supra.

No error.

BOBBITT, C. J., and HIGGINS and SHARP, JJ., dissent as to death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in State v. Jarrette, N.C., 202 S.E.2d 721 (1974).

APPENDIX B

State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973)

able ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant.' 5 Am.Jur.2d *Arrests* § 44 (1962). 'The existence of "probable cause," justifying an arrest without a warrant, is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved.' . . ."

The definition and attendant rules above stated are applicable to probable cause as related to searches.

Here the totality of the circumstances gave the officers reasonable grounds to believe that defendants had committed a crime and that the automobile in which they were riding contained evidence pertaining to the crime. Without repeating the voir dire evidence in the case, we point to certain evidentiary highlights supporting the officers' belief and action: (1) the presence in the automobile of two men seen running from an area behind the Weil-Creech Oil Company toward the then parked automobile in the early morning hours; (2) the presence of a bag of money, some of which was wrapped by material bearing the inscription "Weil-Creech"; and (3) the flight of one of the occupants when Officer Bell commented on the presence of the money.

We can see no constitutional difference between this case and *Chambers* and *Carroll*. Our search reveals that in similar factual situations other jurisdictions have distinguished *Coolidge* and have applied the rule and reasoning of *Chambers* and *Carroll*. See, e. g., United States v. Ellis, 461 F.2d 962 (2nd Cir. 1972); United States v. Castaldi, 453 F.2d 505 (7th Cir. 1971), cert. den. 405 U.S. 992, 92 S.Ct. 1263, 31 L.Ed.2d 460; People v. Munoz, 21 Cal.App.3d 805, 98 Cal.Rptr. 758; People v. Wrona, 7 Ill.App.3d 1, 285 N.E.2d 370; Brinlee v. State, 499 P.2d 1397 (Okl.Cr. 1972); Smith v. Commonwealth, 212 Va. 605, 186 S.E.2d 65.

Probable cause to arrest and search existed at the time of the arrest and continued to exist when the automobile was searched at the police station.

The trial judge correctly admitted evidence concerning the burglary tools found pursuant to the search conducted at the police station.

We have examined defendants' other assignments of error and find that they do not merit discussion.

For reasons stated, the decision of the Court of Appeals is

Reversed.

STATE of North Carolina

v.

James Howard WADDELL.

No. 5.

Supreme Court of North Carolina.

Jan. 17, 1973.

Defendant was convicted in the Superior Court, Sampson County, Marvin K. Blount, Jr., J., of rape, and sentenced to death. He appealed. The Supreme Court, Huskins, J., held that imposition of death penalty in case wherein jury was autho-

rized by statute to impose death penalty in its discretion was impermissible under Eighth and Fourteenth Amendments, and that remand was required for pronouncement of judgment imposing life sentence. The Supreme Court, Bobbitt, C. J., joined by Higgins and Sharp, JJ., further held that it was powerless to ignore, delete or repeal provisions of statute leaving to unbridled discretion of jury whether punishment in criminal case should be death or life imprisonment.

Remanded for judgment.

Huskins, J., filed opinion favoring remand for imposition of life sentence but expressing view that death penalty could validly be imposed in subsequent cases.

Bobbitt, C. J., concurred in part and dissented in part from the opinion of Huskins, J.

Higgins, J., filed opinion concurring in result and concurring in opinion of Bobbitt, C. J.

Lake, J., filed opinion concurring in the views expressed by Huskins, J.

Sharp, J., filed opinion concurring in the opinion of Bobbitt, C. J.

1. Constitutional Law ⇐270
Criminal Law ⇐1213

Infliction of death sentence is prohibited by Eighth and Fourteenth Amendments if either judge or jury is permitted to impose such sentence as matter of discretion. U.S.C.A.Const. Amends. 8, 14.

2. Constitutional Law ⇐270
Criminal Law ⇐1188, 1213

Imposition of death penalty in rape case wherein jury was authorized by statute to impose death penalty in its discretion was impermissible under Eighth and Fourteenth Amendments, and remand was required for pronouncement of judgement imposing life sentence. U.S.C.A.Const. Amends. 8, 14; G.S. § 14-21.

3. Criminal Law ⇐1213

Death sentence may not constitutionally be inflicted in North Carolina unless General Assembly strikes from statutes provisions leaving to unbridled discretion of jury whether punishment shall be death or life imprisonment. G.S. § 14-21.

4. Constitutional Law ⇐70.1(10)

State Supreme Court was powerless to ignore, delete or repeal provisions of statute leaving to unbridled discretion of jury whether punishment in criminal case should be death or life imprisonment. G.S. § 14-21.

Defendant was tried on a bill of indictment, proper in form, charging him with the rape of Mrs. Thelma Jackson on the 8th day of June 1971.

The State's evidence tends to show that when Mrs. Thelma Jackson returned from work about 6 p. m. on 8 June 1971 she unlocked the back door and entered her home. She found a black man standing behind a chair in her living room. He had a stocking over his face and a butcher knife in his pocket. He placed Mrs. Jackson in a chair, tied her hands together with a small cord, and told her he would kill her if she made a noise. Then, using the same cord, he tied her ankles together. She screamed when a neighbor passed on a tractor, and he placed the knife to her neck and threatened to cut her throat.

The intruder then placed Mrs. Jackson on the couch, sat beside her, and said: "I know all about you. I know your husband has been dead about four and a half or five years and you never had any children and you live alone and I know about you." After several minutes of conversation with Mrs. Jackson, he pulled her up from the couch and walked her to the bedroom. This operation took about ten minutes since her feet were still tied. He sat her down in a reclining chair in the bedroom, unzipped her dress in the back, untied her

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...ritence may not constitution-...ted in North Carolina unless ...cnably strikes from statutes ...aving to unbridled discretion ...ther punishment shall be death ...isonment. G.S. § 14-21.

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...e's evidence tends to show that ... Thelma Jackson returned from ... 6 p. m. on 8 June 1971 she un-... back door and entered her ...e found a black man standing ...hair in her living room. He had ... over his face and a butcher ...s pocket. He placed Mrs. Jack-...air, tied her hands together with ...rd, and told her he would kill her ...e a noise. Then, using the same ... tied her ankles together. She ... when a neighbor passed on a ...nd he placed the knife to her ...threatened to cut her throat.

...rader then placed Mrs. Jackson ...ouch, sat beside her, and said: "I ...about you. I know your husband ... dead about four and a half or ...s and you never had any children ...ive alone and I know about you." ...eral minutes of conversation with ...kson, he pulled her up from the ...d walked her to the bedroom. ...ration took about ten minutes ... feet were still tied. He sat her ... a reclining chair in the bedroom, ... her dress in the back, untied her hands, and stripped all her clothing down to the waist. He then tied her hands again, untied her feet and completely undressed her. He then stuffed a large roll of cotton in her mouth but removed it when it appeared she was unable to breathe. He ripped a pillowcase into strips, tying one strip over her mouth and blindfolding her with another. He then placed her on the bed and raped her.

While Mrs. Jackson was still blindfolded, her assailant removed her from the bed, put her clothing back on her, bound her legs together again, and sat her in a chair. He then moved about the house, apparently gathering foodstuffs and other items. In response to Mrs. Jackson's inquiry after he had made several trips to the kitchen, he stated he was doing "what I have to do." He finally left about 7:30 p. m., having been in Mrs. Jackson's presence about an hour and a half, the last thirty minutes of which she was blindfolded. She had observed and talked with him for one hour while he was in her home.

Mrs. Jackson was bleeding badly from her privates and needed medical attention. She eventually worked her hands free, removed her blindfold, untied her feet, and sought help at the home of a black family who lived across the road. Deputy Sheriff Chase arrived within ten minutes after being called.

Items missing from Mrs. Jackson's home included an old pair of Knapp shoes belonging to her deceased husband (S-3), a small teaspoon (S-10), and a roll of adhesive tape. When apprehended, defendant was wearing the shoes and had the spoon and a roll of Johnson & Johnson Adhesive Tape in a little leather case. At the preliminary hearing and in court at the trial, Mrs. Jackson stated that she recognized defendant by his build, "his looks and all of it," and said she would recognize his voice if she ever heard it again. She positively identified defendant as the man who raped her.

After interviewing Mrs. Jackson the night of the rape, officers began an investigation of the crime scene, checking for fingerprints and footprints. Fingerprints were lifted from the windowsill where defendant had entered the house, from the front of the medicine cabinet mirror in the kitchen of the Jackson residence, from the first drawer of the chest of drawers in Mrs. Jackson's bedroom where defendant had obtained the pillowcases he ripped up, from inside the medicine cabinet door, and from a kitchen cabinet. All these fingerprints were later compared by an expert with ink impressions of defendant's fingerprints and in the opinion of the expert were identical.

A set of footprints led from Mrs. Jackson's home to a point in the woods at the base of a pine tree about one hundred fifty yards away where the officers found a pile of articles, including a lady's stocking, a piece of cord, an empty pear can, a pair of brown gloves, a pair of lady's panties and two pieces of a torn pillowcase. Many of these items were identified as having come from Mrs. Jackson's home.

While officers were searching for Mrs. Jackson's assailant, Bruce Jackson, a former highway patrolman, saw defendant in the woods eight to ten miles from Mrs. Jackson's home. Although many officers were in the area searching, Bruce Jackson was alone at the time. He spoke to defendant who said his name was Jackson; that he worked for the Town of Dunn and "they had sent him down there to help capture that man that had messed that white woman about." When asked for some identification, defendant grabbed Bruce Jackson's shotgun and the two men tussled over it for ten or fifteen minutes. Defendant kept repeating, "I am the one that you are looking [for] but you ain't going to tell anybody because I am going to kill you right here and now." During the tussle Mr. Jackson succeeded in firing the shotgun and thus attracted the attention of other officers in the woods. They con-

verged on the scene and took defendant into custody.

Defendant offered no evidence. At the close of the State's evidence his motion for judgment of nonsuit was denied. The jury returned a verdict of guilty of rape as charged in the bill of indictment. Defendant's motion to set the verdict aside was denied and defendant was sentenced to death. He appealed to the Supreme Court assigning as error the denial of his motions and further contending that the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

David J. Turlington, Jr., Clinton, for defendant appellant.

Robert Morgan, Atty. Gen., and Jean A. Benoy, Deputy Atty. Gen., Raleigh, for State of North Carolina.

HUSKINS, Justice:

We overrule defendant's assignments of error based on denial of his motions for nonsuit and to set aside the verdict. The evidence is overwhelmingly sufficient to carry the case to the jury and to support the verdict. Likewise, defendant's third assignment addressed to the charge has no merit and cannot be sustained. The court's charge on circumstantial evidence is free from prejudicial error. We therefore put aside these assignments without discussion and go directly to the constitutional question raised by defendant and argued in the briefs.

Defendant contends that the imposition and carrying out of the death penalty was held in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, (1972), to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The State, on the other hand, disputes defendant's interpretation of the holding in *Furman* and argues that the death sentence was lawfully and constitutionally imposed in this case and should be carried out. These antagonistic positions require an analysis of the *Furman* decision.

Furman v. Georgia was consolidated with Jackson v. Georgia and Branch v. Texas for decision. Each defendant was black. Furman killed a Georgia householder while seeking to enter the home at night. Jackson entered a Georgia home after the husband left for work, held scissors against the neck of the wife and raped her. Branch entered the Texas home of a 65-year-old widow, a white woman, while she slept and raped her, holding his arm against her throat. Furman was convicted of murder, Jackson and Branch of rape, and each was sentenced to death after a trial by jury which, under applicable Georgia and Texas statutes, had discretionary authority to determine whether to impose the death penalty. On certiorari, the United States Supreme Court reversed the judgment in each case insofar as it left undisturbed the death sentence imposed, and the cases were remanded for further proceedings. In an opinion expressing the views of five members of the Court, it was held that the imposition and carrying out of the death sentence in the three cases before the Court constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Four members of the Court dissented, voting to sustain the constitutionality of the statutes under which defendants were tried and sentence of death imposed.

Prior to the decision in Furman v. Georgia, supra, the United States Supreme Court implicitly approved or, albeit in dictum, expressly upheld the constitutionality of capital punishment in many cases, including Wilkerson v. Utah, 99 U.S. 130, 25 L.Ed. 345 (1879); In Re Kemmler, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890); Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947); Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958); Witherspoon v. Illinois, 391

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U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). Thus, since the ratification of the Eighth Amendment one hundred eighty-one years ago, no decision of the United States Supreme Court prior to *Furman* casts the slightest doubt on the constitutionality of capital punishment. Therefore, since the decision in *Furman* is not grounded on prior decisions of the Court, the scope of that holding must be gleaned from the separate opinions of the Justices themselves.

The nine opinions focus upon the Eighth Amendment which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The proscription of cruel and unusual punishments is applicable to the States through the Due Process Clause of the Fourteenth Amendment. Powell v. Texas, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968); Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

We note at the outset that only two members of the Court, Mr. Justice Brennan and Mr. Justice Marshall, concluded that capital punishment for all crimes under all circumstances is prohibited by the Eighth Amendment. Mr. Justice Brennan summarized his views in these words:

> "At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. . . . The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes. . . . Under these principles and this test, death is today a 'cruel and unusual' punishment."

Mr. Justice Marshall reached a like conclusion when he wrote:

> "There is but one conclusion that can be drawn from all of this—*i. e.*, the death penalty is an excessive and unnecessary punishment which violates the Eighth Amendment. . . . In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history."

Thus, it may be seen that these two Justices joined in the *Furman* decision on the basis that capital punishment is *per se* unconstitutional.

Mr. Justice Douglas rested his concurrence on a different basis. He wrote:

> "In these three cases the death penalty was imposed, one of them for murder, and two for rape. In *each the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury.* [Emphasis added] . . . In a Nation committed to Equal Protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, poor and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. . . . Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination. . . . Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amend-

ment. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. *Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.*" (Emphasis added.)

It seems clear that Mr. Justice Douglas left open the question of the constitutionality of a mandatory death penalty and voted to invalidate the death sentence in *Furman* and companion cases on the ground that the trial jury was given statutory discretion as to whether a defendant convicted of rape or murder should be sentenced to death or to life imprisonment.

Mr. Justice Stewart joined the majority opinion on similar grounds: That under the Georgia and Texas statutes, the death penalty was not mandatory for murder and rape but could be imposed in the unfettered discretion of trial juries, and that the exercise of this discretion resulted in "freakish" selection of those who should be executed for their crimes. He expressed his views as follows:

"[A]t least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the Eighth and Fourteenth Amendments. Their case is a strong one. *But I find it unnecessary to reach the ultimate question they would decide.* [Emphasis added] . . . The constitutionality of capital punishment in the abstract is not, however, before us in these cases. For the Georgia and Texas Legislatures have not provided that the death penalty shall be imposed upon all those who are found guilty of forcible rape. And the Georgia Legislature has not ordained that death shall be the automatic punishment for murder. . . . These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

Mr. Justice White concurred in the majority opinion for reasons substantially similar to those of Justice Stewart. The following language from his concurring opinion depicts his views:

"In joining the Court's judgments, therefore, I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment. . . . I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice. . . . That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. The short of it is that the policy of vesting sentencing authority primarily in juries . . . has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course."

Four members of the Court dissented and voted to uphold the constitutionality of the Georgia and Texas statutes under which Furman, Jackson and Branch were tried

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and sentenced to death. The position of the four dissenters is best summed up by Chief Justice Burger as follows:

"There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned. . . . Capital punishment is authorized by statute in 40 States, the District of Columbia and in the federal courts for the commission of certain crimes. On four occasions in the last 11 years Congress has added to the list of federal crimes punishable by death. In looking for reliable indicia of contemporary attitude, none more trustworthy has been advanced. . . . Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment; nor has it ruled that the punishment is barred for any particular class or classes of crimes. The substantially similar concurring opinions of Mr. Justice Stewart and Mr. Justice White, which are necessary to support the judgment setting aside petitioners' sentences, stop short of reaching the ultimate question. . . . The critical factor in the concurring opinions of both Mr. Justice Stewart and Mr. Justice White is the infrequency with which the penalty is imposed. This factor is taken not as evidence of society's abhorrence of capital punishment . . . but as the earmark of a deteriorated system of sentencing. It is concluded that petitioners' sentences must be set aside, not because the punishment is impermissibly cruel, but because juries and judges have failed to exercise their sentencing discretion in acceptable fashion."

[1] The foregoing quotations from the various separate opinions in *Furman* compel the conclusion that capital punishment has not been declared unconstitutional *per se*. Rather, the *Furman* decision holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion.

We now consider the effect of the *Furman* decision on G.S. § 14-21 which reads as follows:

"Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: *Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.*" (Emphasis added)

Does *Furman* invalidate G.S. § 14-21 in its entirety or invalidate only the discretionary proviso, leaving death as the mandatory punishment for rape in North Carolina? A look at history is necessary to put the question in proper perspective.

Blackstone's *Commentaries* tell us,

"Rape was punished by the Saxon laws . . . with death . . . . But this was afterwards thought too hard; and in its stead another severe, but not capital, punishment was inflicted by William the conqueror; viz, castration and loss of eyes; which continued till after Bracton wrote, in the reign of Henry the third. . . .

"In the 3 Edw. I. [1275] by the statute Westm. I. c. 13. The punishment of rape was much mitigated: the offence itself being reduced to a trespass, if not prosecuted by the woman within forty days, and subjecting the offender only to two years imprisonment, and a fine at the king's will. But, this lenity being productive of the most terrible consequences, it was in ten years afterwards, 13 Edw. I. found necessary to make the offence of rape felony, by statute Westm. 2. c. 34. And by statute 18 Eliz.

c. 7. it is made felony without benefit of clergy . . . . ." 4 W. Blackstone, Commentaries, 211-2 (1st ed. 1769).

In 1778, the State of North Carolina enacted what is now G.S. § 4-1 which states:

> "All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."

By this statute the common law death penalty for rape was adopted in North Carolina. This punishment was codified in Vol. I, c. 31, § 5 of the 1837 Revised Statutes of North Carolina.

In 1869, the General Assembly of North Carolina reenacted the punishment for rape in the following language:

> "Every person who is convicted, in due course of law, of ravishing and carnally knowing any female of the age of ten years or more by force and against her will; or who is convicted, in like manner, of unlawfully and carnally knowing and abusing any female child under the age of ten years, shall suffer death." Public Laws of 1868-69, c. 167, § 2.

An amendment in 1917 raised the age of consent from ten to twelve years. See Public Laws 1917, c. 29.

Thus, death has been the punishment for rape in North Carolina for almost two hundred years. Our present statute on the subject, G.S. § 14-21, was amended in 1949 by adding the proviso which (1) empowers the jury in its discretion to recommend and thus to fix the punishment at life imprisonment, and (2) requires the trial judge to so instruct the jury. Session Laws of 1949, c. 299, § 4.

Since the 1949 amendment adding the proviso, seventeen bills or resolutions have been introduced in the General Assembly of North Carolina designed to abolish or limit the imposition of the death penalty for rape or other capital offenses. See House Bills 924, 925, 927 and 928 in the 1955 Session; House Bill 113 in the 1961 Session; House Bill 35, Senate Bill 27 and Senate Resolution 173 in the 1963 Session; House Bills 103 and 351 in the 1965 Session; House Bills 68, 71, 138 and 314 in the 1967 Session; House Bill 160 in the 1969 Session; and House Bill 397 and Senate Bill 251 in the 1971 Session. All of these bills and resolutions failed to receive a favorable report from the committee to which referred, or were tabled or defeated on the floor of the House in which introduced.

The new State Constitution, which was ratified by the people in the general election of 1970, retained the provision contained in the former Constitution of North Carolina authorizing the General Assembly to provide by statute for the imposition of the death penalty for murder, arson, burglary and rape. See Constitution of North Carolina, Article XI, Section 2. Thus, there is nothing in the legislative or constitutional history of this State to indicate an intent by the Legislature, or by the people, to reduce the punishment for rape from death to life imprisonment, or to indicate that the 1949 proviso was enacted for that purpose except upon the discretionary recommendation of the jury, or to indicate that such proviso would have been enacted at all had its unconstitutionality been foreseen by the 1949 General Assembly. Rather, such history demonstrates a constant intent by the people and their representatives to retain the death penalty for murder, arson, burglary and rape notwithstanding the proviso added in 1949.

It is the proviso, and the proviso alone, which creates the discretionary difficulty

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condemned by the *Furman* decision; and it is quite clear that *Furman* strikes down the proviso as violative of the Eighth and Fourteenth Amendments.

The question then arises; Does the remainder of G.S. § 14-21 stand alone with death as the mandatory punishment for rape? Or, is the proviso such a constituent and inherent part of a single statutory scheme of punishment that it is inseverable and the entire statute must fall?

In 16 Am.Jur.2d, Constitutional Law, § 186, the rule of severability is thus stated:

> "If the objectionable parts of a statute are severable from the rest in such a way that the legislature would be presumed to have enacted the valid portion without the invalid, the failure of the latter will not necessarily render the entire statute invalid, but the statute may be enforced as to those portions of it which are constitutional. If, however, the constitutional and unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the residue independently, and accordingly, the entire statute is invalid."

The original portion of G.S. § 14-21 with its mandatory death penalty for rape stood alone and was given full effect by the courts of this State for a century prior to the enactment of the 1949 proviso. Grammatically, as well as historically, the two portions of the statute are distinct and separate and the constitutional invalidity of the added portion will not destroy the part which was in existence prior to the enactment of the unconstitutional portion.

"Usually, when an amendatory exception to a statute proves unconstitutional, the original statute stands wholly unaffected by it." 16 Am.Jur.2d, Constitutional Law, § 184. "When exceptions, exemptions, or provisos in a statute are found to be invalid, the entire act may be void on the theory that by striking out the invalid exception the act has been widened in its scope and therefore cannot properly represent the legislative intent. *This result is not reached, however, when the repugnant exception was added by way of amendment*, as it may be said that the Legislature did intend, at least originally, to pass the act without offering the exception." (Emphasis added) Sutherland, Statutes and Statutory Construction, § 2412 (3d ed. 1943).

In Frost v. Corporation Commission, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929), the United States Supreme Court dealt with an Oklahoma statute which, as originally enacted, required a certificate of public convenience and necessity in order to engage in the business of operating a cotton gin. The statute was thereafter amended to insert a proviso exempting gins operated by cooperatives. The Court held the proviso violated the Equal Protection Clause of the Fourteenth Amendment but upheld the statute as initially written, saying:

> "Here it is conceded that the statute, before the amendment, was entirely valid. When passed, it expressed the will of the legislature which enacted it. Without an express repeal, a different Legislature undertook to create an exception, but, since that body sought to express its will by an amendment which, being unconstitutional, is a nullity and, therefore, powerless to work any change in the existing statute, *that statute must stand as the only valid expression of the legislative intent.*" (Emphasis added)

In United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the Supreme Court of the United States held invalid a proviso in the Federal Kidnapping Act (18 U.S.C. § 1201(a)) providing for the death sentence upon conviction of kidnapping under certain circumstances if the jury so recommended in its verdict.

Originally, the statute made the crime punishable by imprisonment only. The Court held that the remainder of the statute was valid since the unconstitutional proviso was severable from it, saying:

"As we said in Champlin Rfg. Co. v. Commission, 286 U.S. 210, 234, 52 S.Ct. 559, 76 L.Ed. 1062: 'The unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'

"Under this test, it is clear that the clause authorizing capital punishment is severable from the remainder of the kidnapping statute and that the unconstitutionality of that clause does not require the defeat of the law as a whole."

The fact that the proviso in G.S. § 14-21 gives the jury the discretion to recommend life imprisonment rather than death does not distinguish the case before us from United States v. Jackson, supra.

In Bank v. Lacy, 188 N.C. 25, 123 S.E. 475 (1924), this Court said: "The invalidity of one part of a statute does not nullify the remainder when the parts are separable, and the invalid part was not the consideration or inducement for the Legislature to enact the part that is valid." To like effect: Jackson v. Board of Adjustment, 275 N.C. 155, 166 S.E.2d 78 (1969); Clark v. Meyland, 261 N.C. 140, 134 S.E.2d 168 (1964); Fox v. Commissioners of Durham, 211 N.C. 497, 91 S.E.2d 482 (1956); Power Co. v. Clay County, 213 N.C. 698, 197 S.E. 603 (1938); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 22 S.Ct. 431, 46 L.Ed. 679 (1902).

It is the proviso which confers upon juries the discretion to send one defendant to death and another to prison for life for the same crime committed under substantially similar circumstances. This, and only this, is what *Furman* condemns as violative of the Eighth and Fourteenth Amendments. The proviso, then, can no longer be given effect as part of the law of North Carolina. This leaves in effect the original statute making the death sentence mandatory upon a conviction of rape, and forbids an instruction to the jury that it may, in its discretion, fix a different punishment.

In light of the authorities cited, we hold that the unconstitutional proviso in G.S. § 14-21 is severable and the remainder of the statute with death as the mandatory punishment for rape remains in full force and effect. A similar conclusion was reached by the Supreme Court of Delaware in State v. Dickerson, Del.Supr., 288 A.2d 761 (decided November 1, 1972).

We recognize that the Legislature, not the courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of the death penalty is a question for the law-making authorities rather than the courts. In view of the decision in *Furman*, the Legislature may wish to delete the unconstitutional proviso from G.S. § 14-21 (rape), G.S. § 14-17 (murder), G.S. § 14-52 (burglary), and G.S. § 14-58 (arson); or it may wish to rewrite these statutes altogether to give expression to what it conceives to be the public will. Meanwhile, we hold that the effect of the *Furman* decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the

court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge.

Since the invalid proviso in G.S. § 14-21 was given effect from the time it was enacted in 1949 to the date of the *Furman* decision in all cases wherein the defendant was convicted of rape or other capital crimes under the statutes applicable thereto, the practical effect of a judicial determination that the proviso is severable and therefore eliminated from the statute is to change the penalty for rape (or other capital crimes) from *death or life imprisonment in the discretion of the jury* to *mandatory death*. An upward change of penalty by legislative action cannot constitutionally be applied retroactively. Article I, section 16 of the Constitution of North Carolina forbids the enactment of any *ex post facto* law. The Federal Constitution contains a like prohibition against *ex post facto* enactments by a state. See Constitution of the United States, Art. I, sec. 10. It has been held that this section of the Constitution "forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. • • • It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change." Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937). It thus appears that where the punishment at the time of the offense was death or life imprisonment in the discretion of the jury, as in the case before us, a change by the Legislature to death alone would be *ex post facto* as to such offenses committed prior to the change. State v. Broadway, 157 N.C. 598, 72 S.E. 987 (1911).

While we recognize that the letter of the *ex post facto* clause is addressed to legislative action, the constitutional ban against the retroactive increase of punishment for a crime applies as well against judicial action having the same effect. "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action,' or 'that aggravates *a crime*, or makes it *greater* than it was, when committed.' [Citation omitted] If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Bouie v. Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

For the reasons stated, we hold that North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to the date of this decision but shall be applied to any offense committed after such date. *Compare*, Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966).

[2] We now turn to the task of applying the *Furman* decision, and the holding here, to the death sentence imposed upon defendant in this case.

Defendant was tried, convicted and sentenced under G.S. § 14-21, and the trial judge instructed the jury, *inter alia*, as follows: "If you return a verdict of guilty of rape, you may accompany your verdict with a recommendation of life imprisonment. If you make no such recommendation, the law provides that the defendant will be put to death in the gas chamber. If you do so recommend, the punishment will be imprisonment for life. You are completely free to accompany a verdict of guilty with a recommendation of life im-

prisonment or not, as the law leaves that to your complete and unbridled discretion. Thus members of the jury, depending on how you find the facts, there are three possible verdicts which you may return, you may find the defendant guilty of rape with no recommendation; guilty of rape with a recommendation of life imprisonment or not guilty." Thus, the jury was permitted to exercise its discretion and choose between death and life imprisonment. The proviso in G.S. § 14-21 requiring the judge to so charge and permitting the jury in its discretion to so choose is not materially different from the discretion vested in the jury by the Georgia and Texas statutes condemned by *Furman*. It is apparent, therefore, that *Furman* forbids the imposition of the death penalty in this case. This conclusion is buttressed by the fact that, following the decision in *Furman*, five cases in which we had affirmed the imposition of the death sentence were remanded to this Court by the Supreme Court of the United States "for further proceedings," the judgment of this Court having been vacated "insofar as it leaves undisturbed the death penalty imposed." We remanded those cases to the respective superior courts for imposition of sentences of life imprisonment. State v. Miller, 281 N.C. 740, 190 S.E.2d 841 (1972); State v. Hamby and Chandler, 281 N.C. 743, 191 S.E.2d 65 (1972); State v. Chance, 281 N.C. 746, 191 S.E.2d 65 (1972); State v. Westbrook, 281 N.C. 748, 191 S.E.2d 65 (1972); State v. Doss, 281 N.C. 751, 191 S.E.2d 70 (1972).

Accordingly, the judgment of the Superior Court of Sampson County insofar as it imposed the death penalty upon this defendant is reversed. The case is remanded to the Superior Court of Sampson County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Sampson County will cause to be served on the defendant, James Howard Waddell, and on his counsel of record, notice to appear during a session of said Superior Court at a designated time, not less than ten days from the date of the notice, at which time, in open court, the defendant, James Howard Waddell, being present in person and being represented by his counsel, the presiding judge, based on the verdict of guilty of rape returned by the jury at the trial of this case at the December 1971 Session, will pronounce judgment that the defendant, James Howard Waddell, be imprisoned for life in the State's prison.

2. The presiding judge of the Superior Court of Sampson County will issue a writ of habeas corpus to the official having custody of the defendant, James Howard Waddell, to produce him in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

Remanded for judgment.

BOBBITT, Chief Justice (concurring in part and dissenting in part).

[1] I agree with the majority's conclusion that "the *Furman* decision [Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion." Under North Carolina statutes, whether the punishment for first degree murder, or rape, or burglary in the first degree, or arson, is to be death or life imprisonment depends solely on how the jury exercises its unbridled discretion.

Prior to *Furman*, this Court had sustained the convictions and death sentences in State v. Miller, 276 N.C. 681, 174 S.E.2d 481 (1970); State v. Hamby and Chandler, 276 N.C. 674, 174 S.E.2d 385 (1970); State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971); State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971); and State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971). On authority of *Furman*, the Supreme Court of the United States vacated the judg-

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[2-4] The decision on this appeal is that *Furman* requires that this Court vacate the death sentence and remand *this case* to the superior court for the pronouncement of judgment imposing a life sentence. I emphatically agree with this decision. Moreover, I do not think *any death sentence* may be constitutionally inflicted unless *our General Assembly* strikes from our present statutes the provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment. In my opinion, this Court has no right to ignore, delete or repeal these provisions, which were put there by the General Assembly as an integral part of its plan for the punishment of crimes for which the death sentence was permissible. *Furman* did not repeal them. This Court has no right to repeal them.

While unnecessary to the disposition of this appeal, the majority opinion states the views of four members of this Court with reference to the conduct of trials and the sentencing of defendants in the future for crimes of murder in the first degree, rape, burglary in the first degree and arson *committed subsequent to the present decision*. Since the decision in *Furman*, several cases have been tried in our superior courts in which the defendants were convicted and sentenced to life imprisonment when the jury returned verdicts of guilty (no recommendation as to punishment being involved) and at least two cases in which upon a like verdict the defendant received a death sentence. My dissent is not directed to the fact that the majority are giving an advisory opinion or directive to our superior court judges with references to crimes committed *subsequent to Furman*. Although the appeals in these cases will come to us in due course, I agree that our superior court judges are now entitled to some directive from this Court. *The ground on which I dissent is that the majority are giving what I consider to be the wrong advisory opinion or directive.*

The views expressed in the majority opinion *to which I dissent* may be summarized as follows: The *Furman* decision invalidates the portion of G.S. § 14-21 which reads: "Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." The invalidation of this provision leaves intact that portion of the statute which precedes it and provides for punishment by death. The *Furman* decision does not invalidate the death penalty under present North Carolina statutes. It makes death the sole and exclusive punishment for rape. However, the death penalty is not to be imposed and carried out except for crimes committed subsequent to the filing of *this* decision.

If *Furman* had decided that the portion of G.S. § 14-21 quoted above was separable and invalid and that death is now the sole and exclusive punishment for rape, such decision would apply to all rapes com-

mitted subsequent to 29 June 1972, the date *Furman* was decided. But this was *not* the decision in *Furman*. *Furman* simply held that *the death penalty provision* of G.S. § 14-21 as now constituted was invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out. The dismemberment of G.S. § 14-21, and the declaration that death is the sole and exclusive punishment for rape, are neither required nor warranted by the decision in *Furman*.

Under Article XI, §§ 1 and 2, of the Constitution of North Carolina, the General Assembly is authorized to provide that the crimes of murder, rape, burglary and arson, and these only, may be punishable by death. Pursuant thereto, the General Assembly has enacted statutes which provide that a person convicted of first degree murder, G.S. § 14-17, or of rape, G.S. § 14-21, or of first degree burglary, G.S. § 14-52, or of arson, G.S. § 14-58, shall suffer death *unless* the jury, at the time of rendering its verdict in open court, recommends that the defendant's punishment shall be imprisonment for life in the State's prison.

There has been no change in any of the provisions of G.S. § 14-17, G.S. § 14-21, G.S. § 14-52, and G.S. § 14-58, since the enactment of Chapter 209, Session Laws of 1949, which contains the following: "Sec. 4. Section 14-21 of the General Statutes of North Carolina is hereby *rewritten* so as to read as follows:

"Sec. 14-21. Punishment for rape. Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: *Provided*, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." (Our italics.)

Sections 14-17, §§ 14-52 and 14-58 of the General Statutes were rewritten by sections 1, 2 and 3 of Chapter 209, Session Laws of 1949. As rewritten they prescribed in like manner the punishment for murder in the first degree, burglary in the first degree and arson, respectively.

Our General Assembly has provided that no death sentence can be pronounced unless (1) the jury is instructed that the mandatory punishment will be death unless the jury when returning its verdict in open court recommends that the punishment be imprisonment for life in the State's prison, and unless (2) notwithstanding such instruction the jury returns a verdict of guilty and does not recommend that the punishment be imprisonment for life in the State's prison. Subsequent to the enactment of the 1949 Act, whether the punishment for murder in the first degree, or for rape, or burglary in the first degree, or for arson was to be death or life imprisonment was to be determined by juries, case by case, rather than by law applicable to all who committed crimes bearing those names. This Court consistently held that no constitutional right of a defendant was violated by provisions which authorized the jury, upon finding a defendant guilty of murder in the first degree, or of rape, or of burglary in the first degree or of arson, to determine whether the punishment was to be death or imprisonment for life, notwithstanding the absence from the statute of any standards to guide the jury in making that determination.

Notwithstanding our decisions upholding G.S. § 14-17, G.S. § 14-21, G.S. § 14-52 and G.S. § 14-58, the possibility that the Supreme Court of the United States would render a decision substantially like the decision in *Furman* had been anticipated. In the report submitted by the Judicial Council for consideration by the General Assembly of 1959, attention was called to this possibility. *If the General Assembly wished to continue the death penalty for the crime of rape*, it was recommended that G.S. § 14-21 be amended by *striking*

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the following: "Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." Similar recommendations were made with reference to G.S. § 14-17 (first degree murder), G.S. § 14-52 (first degree burglary) and G.S. § 14-58 (arson). To implement these recommendations, bills were prepared and introduced. H.B. No. 136 (relating to rape, first degree burglary and arson), and H.B. No. 137 (relating to murder in the first degree), were referred to Judiciary Committee No. 2 of the House. Both received unfavorable reports. The General Assembly, although advised that the provision for the imposition of a death sentence might be held invalid, refused to prescribe death as the punishment for rape without providing for the alternative of life imprisonment if the jury so recommended.

H.B. No. 397 was introduced in the General Assembly of 1971. Section 2 thereof provided: "Sec. 2. G.S. 14-21 is hereby amended by striking the following words: 'shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison.', and by inserting in lieu thereof the following words: 'shall suffer punishment by imprisonment for life in the State's prison.'" Sections 1, 3 and 4 of H.B. No. 397 provided for the amendment in like manner of the provisions of G.S. § 14-17, G.S. § 14-52 and G.S. § 14-58 relating to punishment for murder in the first degree, burglary in the first degree and arson. H.B. No. 397 was referred to and (as amended) reported favorably by Judiciary Committee No. 2 but failed to pass the House on second reading.

The reasonable inference from the foregoing is that the General Assembly wanted G.S. § 14-17, G.S. § 14-21, G.S. § 14-52 and G.S. § 14-58 to remain exactly as they had been since 1949 and as upheld by the decisions *of this Court*. All provisions of G.S. § 14-21 relate to the single subject indicated by the caption, to wit, "Punishment for rape." The provisions thereof constitute a single legislative plan. Only the *death penalty provision* was invalidated by *Furman*.

It is the decision of a majority of this Court—not the decision in *Furman*—which dismembers G.S. § 14-21 and declares a particular portion thereof invalid and undertakes—in direct conflict with *Furman*—to validate the death penalty provision of G.S. § 14-21 and adjudge that under present statutes death is the sole and exclusive punishment for rape. The main thrust of *Furman* is to restrict the circumstances in which capital punishment may be imposed. It is not only legally unsound but ironic and unrealistic to use *Furman* as a basis for holding that *hereafter under present statutes* death will be the sole permissible punishment for rape.

Whether the General Assembly *would have prescribed* death or life imprisonment if it had been confronted with the necessity of making that decision cannot be answered. In my view, this question must be answered now by the General Assembly rather than by this Court's speculation as to what the General Assembly at previous sessions would have done if they had been confronted with the necessity of making that decision.

The reliance placed by the majority on United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), invites further consideration of that decision. In *Jackson, the death penalty provision* of the Federal Kidnapping Act (18 U.S.C. § 1201(a)) was held *invalid* because it imposed an impermissible burden upon an accused's exercise of his Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand a jury trial. In Pope v. United States, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968), based on *Jackson, the death penalty provision* of the Federal Bank Robbery Act (18 U.S.C. § 2113(e)) was held *invalid*. No other

provision of either of these statutes was invalidated.

The provision for punishment by death "if the verdict of the jury shall so recommend" considered in *Jackson* was incorporated in the Federal Kidnapping Act when rewritten by the Act of May 18, 1934, 48 Stat. 781-82. The death penalty provision considered in *Pope* was a part of the original Federal Bank Robbery Act of May 18, 1934, 48 Stat. 783. Section 3 provided that the violation thereof "shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct." *No statute amending or rewriting the original Act* was involved.

Whether the death penalty provision was a part of the original act or incorporated by later amendment or rewriting was not the basis of decision in either *Jackson* or *Pope*. Moreover, the decisions in *Jackson* and *Pope* were not based upon the discretionary power granted to the jury. They were based upon the fact that Rule 23(a) of the Federal Rules of Criminal Procedure provided: "Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." Under this rule, if a defendant was permitted to plead guilty or to waive a jury trial, he would thereby avoid the possibility of a death sentence.

In State v. Anderson, 281 N.C. 261, 188 S.E.2d 336 (1972), the defendant appealed to this Court from a judgment which imposed death sentences based on verdicts of guilty of murder in the first degree (without recommendation of life imprisonment). The murders for which defendant was indicted and convicted were committed on 29 June 1971.

The opinion in State v. Anderson, *supra* at 267, 188 S.E.2d at 340, states: "*Jackson* and *Pope* stand for the proposition that every defendant has a constitutional right to plead not guilty and that the Federal Constitution does not permit the establishment of a death penalty applicable only to those defendants who assert their constitutional right to contest their guilt before a jury."

Chapter 646, Session Laws of 1953, codified as G.S. § 15-162.1, provided in pertinent part as follows: "(a) Any person, when charged in a bill of indictment with the felony of murder in the first degree, or burglary in the first degree, or arson, or rape, when represented by counsel, whether employed by the defendant or appointed by the court under G.S. 15-4 and G.S. 15-5, may, after arraignment, tender in writing, signed by such person and his counsel, a plea of guilty of such crime; and the State, with the approval of the court, may accept such plea. . . . (b) In the event such plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison."

This Court, being of the opinion that the procedure authorized by G.S. § 15-162.1 did not preclude a sentence of death after a conviction by a jury without recommendation of life imprisonment, upheld the convictions and death sentences in the following cases: State v. Atkinson (murder), 275 N.C. 288, 167 S.E.2d 241 (1969); State v. Hill (murder), 276 N.C. 1, 170 S.E.2d 885 (1969); State v. Roseboro (murder), 276 N.C. 185, 171 S.E.2d 886 (1970); State v. Sanders (murder), 276 N.C. 598, 174 S.E.2d 487 (1970); State v. Williams (murder), 276 N.C. 703, 174 S.E.2d 503 (1970); State v. Atkinson (rape), 278 N.C. 168, 179 S.E.2d 410 (1971).

Subsequently, based on *Jackson* and *Pope*, the Supreme Court of the United States reversed the judgments in these cases "insofar as [they] impose[d] the death sentence" and remanded the cases to this Court for further proceedings. Atkinson v. North Carolina, 403 U.S. 948, 91 S.Ct. 2283, 29 L.Ed.2d 859(1971); Hill v. North

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Carolina, 403 U.S. 948, 91 S.Ct. 2287, 29 L.Ed.2d 860 (1971); Roseboro v. North Carolina, 403 U.S. 948, 91 S.Ct. 2289, 29 L.Ed.2d 860 (1971); Sanders v. North Carolina, 403 U.S. 948, 91 S.Ct. 2290, 29 L.Ed.2d 860 (1971); Williams v. North Carolina, 403 U.S. 948, 91 S.Ct. 2293, 29 L.Ed.2d 860 (1971); Atkinson v. North Carolina, 403 U.S. 948, 91 S.Ct. 2292, 29 L.Ed.2d 861 (1971).

Thereafter, this Court remanded each of these cases to the superior court where it was tried with directions that judgments imposing sentences of life imprisonment be pronounced. State v. Atkinson, 279 N.C. 386, 183 S.E.2d 105 (1971); State v. Hill, 279 N.C. 371, 183 S.E.2d 97 (1971); State v. Roseboro, 279 N.C. 391, 183 S.E.2d 103 (1971); State v. Sanders, 279 N.C. 389, 183 S.E.2d 107 (1971); State v. Williams, 279 N.C. 388, 183 S.E.2d 106 (1971); State v. Atkinson, 279 N.C. 385, 183 S.E.2d 105 (1971).

In the report submitted by the Judicial Council for consideration by the General Assembly of 1929, attention was called to the possibility that the Supreme Court of the United States would hold that a death sentence could not be imposed and carried out if a defendant could avoid the possibility of a death sentence by pleading guilty and thereby surrendering his right to jury trial. If the General Assembly wished to continue the death penalty, it was recommended that G.S. § 15-162.1 be repealed. G.S. § 15-162.1 was repealed by Chapter 117, Session Laws of 1929. It is here noted that G.S. § 15-162.1 was not detached and invalidated by the decisions of the Supreme Court of the United States in the six cases referred to above.

As noted in State v. Anderson, *supra*. "[F]or some obscure reason, the General Assembly reenacted the provisions of G.S. 15-162.1 by Chapter 562 of the 1971 Session Laws, effective 15 June 1971. Then, apparently to correct the error, G.S. 15-162.1 was again repealed by enactment of Chapter 1225 of the 1971 Session Laws, effective 21 July 1971. It thus appears that from 15 June 1971 to 21 July 1971 the death penalty provisions of our statutes once again applied only to those defendants who asserted their right to plead not guilty. United States v. Jackson, *supra*; Pope v. United States, *supra*; Atkinson v. North Carolina, *supra*. Here, the murders were committed on 29 June 1971 while the provisions of G.S. § 15-162.1 were in effect, and therefore the death sentences in these cases are unconstitutional and cannot be carried out. Hill v. North Carolina, *supra* [403 U.S. 948, 91 S.Ct. 2287, 29 L.Ed. 2d 860]." The murders having been committed when (reinstated) G.S. § 15-162.1 was in effect, this Court vacated the death sentences and remanded the cases to the superior court for the pronouncements of judgments imposing sentences of life imprisonment.

From 1913 until the repeal of G.S. § 15-162.1, North Carolina's legislative plan in respect of the death penalty was embodied in G.S. § 14-17, G.S. § 14-21, G.S. § 14-52, G.S. § 14-58 and in G.S. § 15-162.1. Although enacted in 1953 as a separate statute, G.S. § 15-162.1 was *in pari materia* with G.S. § 14-17, G.S. § 14-21, G.S. § 14-52 and G.S. § 14-58 as rewritten in 1949. Hence, G.S. § 15-162.1 had to be considered as if its provisions were incorporated in G.S. § 14-17, G.S. § 14-21, G.S. § 14-52 and G.S. § 14-58 as rewritten in 1949. When the Supreme Court of the United States, on authority of *Jackson* and *Pope*, vacated the death sentences which this Court had upheld in *Atkinson, Roseboro, Sanders* and *Williams*, it did not hold that G.S. § 15-162.1 was invalid. As this Court recognized in State v. Anderson, *supra*, what the Supreme Court held was that so long as G.S. § 15-162.1 remained a part of our legislative plan, no death sentence could be imposed or carried out. This objection could be and was removed by the repeal of G.S. § 15-162.1. In like manner, the decision in *Furman* does not invalidate any particular clause of G.S. § 14-17, G.S. § 14-21, G.S. § 14-52 or G.S. § 14-58. It

simply holds that no death sentence can be imposed and carried out as long as our statute contains provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment.

The *Furman* decision was filed 29 June 1972. Its impact upon state statutes similar to our G.S. § 14-17, G.S. § 14-21, G.S. § 14-52, and G.S. § 14-58 was considered in the decisions discussed below.

In State v. Johnson, 31 Ohio St.2d 106, 285 N.E.2d 751 (1972), the jury found the defendant guilty of murder in the first degree and did not recommend mercy. His appeal from a death sentence was decided by the Supreme Court of Ohio on 19 July 1972. The pertinent portion of the Ohio statute provided: "Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life." Ohio R.C. § 2901.01 (1954).

The following excerpts from the opinion of Justice Brown set forth the disposition of the appeal and the rationale of the Court's decision:

"The United States Supreme Court, in Furman v. Georgia . . . has held that the carrying out of a death penalty imposed at the discretion of the trier of the facts constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

"Under that holding, which we are required to follow, the infliction of the death penalty under the existing law of Ohio is not unconstitutional (with the possible exception of the taking of the life or attempting to take the life of the President, Vice President, or a person in the line of succession to the presidency [R.C. 2901.09], or of the Governor or Lieutenant Governor [R.C. 2901.10], which statutes purport to impose a mandatory penalty of death).

"We have reviewed the record of the proceedings in this case and find ample evidence of guilt of murder in the first degree.

. . . . . .

"It is our conclusion that, except as to the death sentence, the judgment of the Court of Appeals is affirmed. With regard to the death sentence, the judgment of the Court of Appeals must be modified and the sentence is reduced to life imprisonment, as prescribed in R.C. 2901.01."

In Capler v. State, Miss., 268 So.2d 338 (1972), the defendant was convicted of murder and sentenced to suffer death. His conviction and sentence were affirmed by the Supreme Court of Mississippi, which also denied his petition for a rehearing. The Supreme Court of the United States granted his petition for certiorari and ordered "that the judgment of the Supreme Court of Mississippi in this case be vacated insofar as it leaves undisturbed the death penalty imposed and that this cause be remanded to the Supreme Court of the State of Mississippi for further proceedings." Capler v. Mississippi, 408 U.S. 937, 92 S. Ct. 2862, 33 L.Ed.2d 754 (1972). This order and mandate followed the decision in *Furman*.

The pertinent Mississippi statute provided: "Every person who shall be convicted of murder shall suffer death, unless the jury rendering the verdict shall fix the punishment at imprisonment in the penitentiary for the life of the convict; or unless the jury shall certify its disagreement as to the punishment as provided by section 1293 [Code of 1930; § 2536, Code of 1942] in which case the court shall fix the punishment at imprisonment for life." Miss. Code of 1942, § 2217 (1957). Upon further consideration, the Supreme Court of Mississippi remanded the case to the trial court for the pronouncement of a judgment of life imprisonment. The rationale

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of this decision is epitomized by Chief Justice Gillespie in these words: "The only infirmity in section 2217 is that the harsher penalty of death may not lawfully be imposed. The remaining part of the statute is complete, and it does not follow that the remaining provision providing for imprisonment in the penitentiary for the life of the defendant must fall. We hold that because of the decision in Furman v. Georgia the death penalty cannot be inflicted; that the remainder of the statute is valid, and the only other punishment for murder is life imprisonment." *Accord*, Peterson v. State, Miss., 268 So.2d 335 (1972).

In State v. Square, La., 268 So.2d 229 (1972), the defendant's conviction of murder and the death sentence pronounced thereon had been affirmed by the Supreme Court of Louisiana but the Supreme Court of the United States, citing Stewart v. Massachusetts, 408 U.S. 845, 92 S.Ct. 2845, 33 L.Ed.2d 741 (1972), following Furman v. Georgia, vacated the judgment insofar as it left undisturbed the death penalty imposed and remanded the case for further proceedings. 408 U.S. 933, 92 S.Ct. 2851, 33 L.Ed.2d 760 (1972). The pertinent portion of the Louisiana statute provided: "In a capital case the jury may qualify its verdict of guilty with the addition of the words 'without capital punishment,' in which case the punishment shall be imprisonment at hard labor for life." L.S.A.-C.Cr.P. art. 817 (1967).

Upon consideration upon remand, the per curiam opinion of the Supreme Court of Louisiana contains the following:

"We construe the Mandate of the United States Supreme Court to require the imposition of a sentence other than death. Cf., State v. Shaffer, 260 La. 635, 257 So.2d 121 (1971) and State v. Duplessis, 260 La. 644, 257 So.2d 135 (1971).

"Accordingly, in compliance with the Mandate of the United States Supreme Court, the death sentence imposed upon defendant is annulled and set aside, and the case is remanded to the 4th Judicial District Court with instructions to the trial judge to sentence the defendant to life imprisonment.

"Case remanded."

In Garcia v. State, 501 P.2d 1128 (Okl.Cr.1972), the jury found the defendant guilty of murder and fixed his punishment at death. The pertinent Oklahoma statute provided: "Every person convicted of murder shall suffer death, or imprisonment at hard labor in the State penitentiary for life, at the discretion of the jury. Upon trial of an indictment for murder, the jury, if they find the defendant guilty, must designate in their verdict whether he shall be punished by death or imprisonment for life at hard labor, and the judgment of the court shall be in accordance therewith. But upon a plea of guilty the court shall determine the same." 21 Okla.Stat.Ann. § 707 (1958). On 21 June 1972, the Court of Criminal Appeals of Oklahoma affirmed the conviction and death sentence. However, that decision was modified 25 October 1972, on rehearing, at which time the following order was entered: "In the light of Furman v. Georgia, Jackson v. Georgia and Branch v. Texas . . . the judgment and sentence of death by electrocution is modified to a term of life imprisonment, and as so Modified, the judgment and sentence is Affirmed." 501 P.2d at 1141.

In People v. Speck, 52 Ill.2d 231, 287 N.E.2d 699 (1972), the jury found the defendant guilty of murder in each of eight cases. His convictions and the death sentences pronounced thereon were affirmed by the Supreme Court of Illinois. However, the Supreme Court of the United States reversed each judgment insofar as it imposed a death sentence.

The pertinent portions of the Illinois statutes (S.H.A. ch. 38 (1972)) are quoted below:

"§ 9-1. *Murder*

* * * * * *

"(b) Penalty.

"A person convicted of murder shall be punished by death or imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 10 years. If the accused is found guilty by a jury, a sentence of death shall be imposed by the court unless the jury's verdict so provides in accordance with Section 1-7(c)(1) of this Code."

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"§ 1-7. *Judgment, Sentence and Related Provisions*

* * * * * *

"(c) Capital Offenses.

"(1) Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, the jury may return a verdict of death. Where such verdict is returned by the jury, the court may sentence the offender to death or to imprisonment. Where such verdict is not returned by the jury, the court shall sentence the offender to imprisonment."

Upon remand of the *Speck* case, Justice Schaefer, speaking for the Supreme Court of Illinois, said: "The Supreme Court has now held that a defendant could not be validly sentenced to death under the same Illinois statutes that are applicable to this case. (Moore v. Illinois (1972), 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706; Furman v. Georgia. . . .) Therefore, the death penalty cannot be reimposed on the defendant, and the only remaining question is the procedure to be followed in resentencing him to a sentence other than death."

In Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972), the jury found the defendant guilty of murder in the first degree and fixed the penalty at death. On direct appeal, the conviction was affirmed but the death sentence was vacated and the *defendant was sentenced to life imprisonment*. The pertinent portion of the Pennsylvania statute provided: "Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall, in the manner hereinafter provided, fix the penalty." 18 Pa.Stat.Ann. § 4701 (1963). The ground of decision was stated by Justice Roberts as follows: "In Furman v. Georgia, . . . the United States Supreme Court recently held *that the imposition of the death penalty under statutes such as the one pursuant to which the death penalty was imposed upon appellant is violative of the Eighth and Fourteenth Amendments.* Accordingly, appellant's sentence of death may not now be imposed." 295 A.2d at 845. (Our italics.) *Accord*, Commonwealth v. Sharpe, Pa., 295 A.2d 319 (1972); Commonwealth v. Lopinson, Pa., 295 A.2d 324 (1972); Commonwealth v. Ross, 449 Pa. 103, 295 A.2d 629 (1972).

In Graham v. State, Ark., 486 S.W.2d 678 (1972), the jury found the defendant guilty of murder in the first degree and did not recommend a life sentence. The pertinent Arkansas statute provided: "The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor." Ark.Stat.Ann. § 43-2153 (Repl.1964). Upon defendant's appeal, the Supreme Court of Arkansas upheld the conviction but remanded the case to the trial court for the pronouncement of a judgment of life imprisonment. The following excerpt from the opinion of Justice Byrd indicates the ground of decision: "[T]he U. S. Supreme Court, as presently constituted, has recently decided that where a jury is permitted to decide between the punishments of life and death, the death penalty constitutes 'cruel and unusual punishment' and that such interpretation is applicable to the several states through the Fourteenth Amendment. See Furman v. Georgia. . . .

"So long as the ruling in Furman v. Georgia, *supra*, is made applicable to this State, we are obliged to reduce appellant's

sentence from death to life imprisonment as being the next highest available penalty, Ark.Stat.Ann. § 43-2308 (Repl.1964)." 486 S.W.2d at 679.

In State v. Baker, 81 Wash.2d 281, 501 P.2d 284 (1972), the jury found defendant guilty of murder in the first degree and asked that the death penalty be inflicted. The pertinent portion of the Washington statute provided: "Murder in the first degree shall be punishable by imprisonment in the state penitentiary for life, unless the jury shall find that the punishment shall be death. . . ." RCWash.Ann. § 9.48.-030 (1961). Notwithstanding the jury's request, the trial judge deferred imposition of the death penalty on the condition that the defendant be incarcerated for life not subject to parole. The case was before the Supreme Court of Washington on the State's appeal from that order. In remanding the case for a proper sentence in the light of *Furman*, the Court said: "The decision in *Furman* has rendered the issue presented here moot *since the state is now precluded from any attempt to have the death penalty imposed under the existing statute.* The question whether a trial court may defer the death penalty has become academic." *Id.* at 284-285. (Our italics.)

In Huggins v. Commonwealth, Va., 191 S.E.2d 731 (1972), the jury found the defendant guilty of first degree murder and fixed his punishment at death. The pertinent statute provided: "Murder of the first degree shall be punished with death, or by confinement in the penitentiary for life, or for any term not less than twenty years." Va.Code 1950 § 18.1-22. Based on *Furman*, Justice Poff, for the Supreme Court of Virginia, said: "Insofar as it authorized discretionary imposition of the death penalty, Virginia's statute is unconstitutional. With respect to the death sentence, the judgment is vacated." *Id.* at 735. The conviction was upheld and the case was remanded for a new trial on the issue of punishment, that is, to determine whether the confinement in the penitentiary was to be for life, or for a term of twenty years, or for a term exceeding twenty years. *Accord*, Hodges v. Commonwealth, Va., 191 S.E.2d 794 (1972).

Although the above-cited decisions in which death sentences were reversed and sentences of life imprisonment were substituted therefor involved crimes committed prior to *Furman*, none suggests that a death sentence may be imposed and carried out unless and until present statutory provisions are amended. All either state or clearly imply that under existing statutes the death sentence may not be imposed and carried out without regard to whether the crime was committed before or subsequent to *Furman*.

The Florida, Louisiana and Pennsylvania cases discussed below relate to current and future problems of procedure because of unequivocal holdings that under existing statutes a death penalty cannot be imposed and carried out.

In Donaldson v. Sack, 265 So.2d 499 (Fla.1972), Donaldson, who had been indicted for murder in the first degree, filed his petition in the Supreme Court of Florida for a writ of prohibition. Fla.Const. Art. V, § 9(2), F.S.A., vested in the criminal courts of record jurisdiction of "all criminal cases not capital." Fla.Const. Art. V, § 6(3), vested in the circuit courts "all criminal cases not cognizable by subordinate courts." Donaldson asserted that respondent, Circuit Court Judge Sack, had no jurisdiction to proceed with his case because, as a result of the decision in *Furman*, "capital cases" no longer existed in Florida.

On 29 June 1972, when *Furman* was decided, Florida statutes then in force included the following:

"The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable

crime against nature or kidnapping, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082." Fla.Stat.Ann. § 782.04(1) (1972 Supp.), F.S.A.

"Whoever ravishes and carnally knows a female of the age of ten years or more, by force and against her will, or unlawfully or carnally knowns and abuses a female child under the age of ten years, shall be guilty of a capital felony, punishable as provided in § 775.082. . . ." Fla.Stat. Ann. § 794.01 (1972 Supp.), F.S.A.

"A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, in the discretion of the court." Fla.Stat. Ann. § 775.083(1) (1972 Supp.) F.S.A.

A Florida statute which became effective 1 October 1972, and is now codified as section 775.082(2) and (3), provided: "(2) In the event *the death penalty* in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person who has been convicted of a capital felony shall be punished by life imprisonment.

"(3) In the event *the death penalty* in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment with no eligibility parole." (Our italics.)

Excerpts from the opinion of Judge Dekle are quoted below.

"Since Furman v. Georgia . . . in effect 'removes' (until new legislation which may revive it) 'capital cases,' then there appears to be no logical escape from the fact that our circuit courts at this time, and until any legislation which may revive 'capital cases,' do not have jurisdiction in those cases heretofore delineated as 'capital' and accordingly subsequent to *Furman* jurisdiction in such cases now pending or being filed vests in the courts of record and may be transferred there in, those 17 counties of Florida which have such courts."

"We are unable in the face of existing authorities and logic to find support for the continuance of 'capital offense' as heretofore applied. Accordingly, it must fall with the U. S. Supreme Court's holding against the death penalty as provided under present legislation. Our decision is compelled by that Court's action."

"We find no difficulty with a continuation of the *sentencing* for these former 'capital offenses' under § 775.082(1) as automatically life imprisonment upon conviction, inasmuch as that is the only offense left in the statute. . . . The elimination of the death penalty from the statute does not of course destroy the entire statute. We have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for doing so and of course this clearly exists in these circumstances."

"The removal of capital punishment only removes 'capital cases' as that term has been known. The *offense*—and the imposition of a life sentence upon conviction—remains. . . . There simply is not at this time such a designation as a 'capital case' as set forth in the several provisions of our Constitution, statutes and rules."

Since there were no "capital cases" under existing Florida statutes, the court then discusses the drastic impact of its decision upon Florida's Criminal Rules relating to (1) the requirement of twelve jurors in a "capital case," (2) provisions for a speedy trial, (3) jury selection procedures, (4) bifurcated trial procedures, (5) neces-

sity for indictment by a grand jury, and (6) right to bail.

In Anderson v. State, 267 So.2d 8 (Fla. 1972), the Supreme Court of Florida, based on *Furman*, vacated the death sentences of forty defendants. It corrected the sentences of those who had been convicted of murder in the first degree by providing that each be imprisoned for the term of his natural life. In doing so, the Court said: "The elimination of the death penalty from the statute prescribing the penalty for murder in the first degree does not destroy the entire statute. The only sentence which can now be imposed upon conviction of the crime of murder in the first degree is life imprisonment. This is an automatic sentence and a reduction from the sentence previously imposed. The Court has no discretion." The defendants in the rape cases having been convicted for rapes committed prior to 1 January 1972, were subject to imprisonment for life *or* for any term of years within the discretion of the Court. Fla. Stat.Ann. § 794.01 (1941). Their cases were remanded for resentencing.

On authority of *Donaldson* and *Anderson, supra*, the Supreme Court of Florida in State v. Whalen, 261 So.2d 678 (Fla. 1972), held that a trial judge, sitting as sole trier of fact after accepting a plea of guilty to first degree murder and holding an evidentiary hearing on the issue of the extent of penalty, did not have power to impose the death sentence. Chief Justice Roberts said: "This question concerning bifurcated trials is moot since at the present time capital punishment may not be imposed. This Court has held that there are currently no capital offenses in the State of Florida. If there is no capital offense, there can be no capital penalty." *Id.* at 679.

In Ex Parte Contella, 485 S.W.2d 910 (Tex.Cr.App.1972), the appeals were from orders in habeas corpus proceedings in which the accused were denied bail after indictment for murder with malice. The Texas Constitution contained this provision: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident. . . ." A Texas statute provided: "All prisoners shall be bailable unless for capital offenses, when the proof is evident." A capital felony was defined by statute as "(a)n offense for which the highest penalty is death." The cited Texas decisions had held that "[t]he term 'proof is evident' means the accused, with cool and deliberate mind and formed design, maliciously killed the deceased, and that upon a hearing of the facts before the court a dispassionate jury would, upon such evidence, not only convict but would assess the death penalty." Vernon's Ann.P.C. art. 1257 provides: "The punishment for murder shall be death or confinement in the penitentiary for life or for any term of years not less than two." Vernon's Ann.C.Crim.Proc. art. 37.07 (1972 Supp.) provides that, in capital cases, where the state has made it known in writing prior to trial that it will seek the death penalty, the punishment must be assessed by the jury.

The following excerpts from the opinion of Judge Roberts set forth the disposition of the appeals and the rationale of the decision.

"In the case of Furman v. Georgia . . . the United States Supreme Court held that the death penalty, at least insofar as it is currently imposed in this country, 'constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.' That being the case, we conclude that the death penalty, as it is currently authorized, may not be imposed as a penalty for the crime of murder.

"In light of this holding, the question which is before the Court is whether, in terms of our Constitution and statute, bail may now be denied in cases in which, prior to the holding in Furman v. Georgia, *supra*, the death penalty could have been imposed. We conclude that bail may not be denied in such cases.

* * * * * *

"We therefore conclude that bail may no longer be denied on the ground that the offense is a capital offense and the proof is evident. Since the death penalty may not be imposed, there no longer exists a 'capital felony' as defined in Art. 47, V.A.P.C. Likewise, since the death penalty is no longer a possible penalty, it is impossible for the State to offer evidence, in this or any other case, sufficient to establish that the 'proof is evident' as that term is defined in Ex parte Paul, *supra*, [420 S.W.2d 956 (Tex.Cr.App.)]. Therefore, there is no case in which bail may be denied under the provisions of Art. I, Section 11 of the Texas Constitution or Art. 1.07, V.A.C.C.P.

"The orders denying bail are reversed and the trial judge is ordered to set bail herein." 488 S.W.2d at 911-912.

In Commonwealth v. Truesdale, Pa., 295 A.2d 879 (1972), the defendant was awaiting trial on indictments of first degree murder and conspiracy. Under the Pennsylvania Constitution a "capital" offense is not bailable and defendant had been denied bail. After the decision in *Furman*, defendant made an application for his release on bail on the ground that *Furman* abolished the death penalty as it theretofore had existed in Pennsylvania. After a hearing, the trial court granted bail. The Commonwealth immediately filed a petition in the Supreme Court requesting the assumption of plenary jurisdiction to determine whether defendant had a right to bail pending trial. The Court observed that "[w]ith the decision of the United States Supreme Court in Furman v. Georgia . . . as well as this Court's decision in Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 852 (1972), *which cases have invalidated the death penalty as it presently exists in Pennsylvania*, we are left to decide if the definition of 'capital offense' which we adopted in *Alberti* [Commonwealth ex rel. Alberti v. Boyle, 412 Pa. 302, 194 A.2d 97] requires that the bail set for Truesdale was proper." 295 A.2d at 882 (Our italics.) Holding that bail was properly granted, the Court stated that "since there are presently no criminal offenses in the Commonwealth for which the death penalty may be imposed, there are no 'capital offenses'; hence, by mandate of our Constitution, all offenses are bailable prior to trial." *Id.* The Court clearly recognizes and accepts the fact that the effect of the *Furman* decision was to make "the maximum penalty for murder in the first degree . . . life imprisonment." 295 A.2d at 883.

In State v. Holmes, La., 269 So.2d 237 (1972), and in State v. Flood, 269 So.2d 212 (La.1972), the Supreme Court of Louisiana held that *Furman* did not destroy the classification of certain crimes in Louisiana as capital offenses. The impact of *Furman* was described in these words: "The crime [of murder] remains unchanged; only the penalty has been changed. True, the penalty is what made murder a capital offense, and it is not actually a capital offense in Louisiana today. But the *nature* of the offense has not changed—only the punishment." State v. Flood, *supra*, at 214. Hence, *Holmes* held that a person charged with a crime formerly punishable by death had to be tried by a jury of twelve, all of whom must concur to render a verdict; and *Flood* held that a person so charged was not entitled *as of right* to be released on bail.

The majority opinion cites Delaware v. Dickerson, Del.Supr., 298 A.2d 761 (1972). This is the only decision disclosed by our research which supports to any extent the view of the majority herein. Dickerson was charged with a first degree murder committed prior to the decision in *Furman*. Two questions of law were certified by the Superior Court to the Supreme Court, to wit: "1. Are the discretionary mercy provisions of 11 Del.C. § 3901 unconstitutional under Furman v. Georgia? 2. If the answer to Question 1 is yes, is the mandatory death penalty prescribed in 11 Del.C. § 571 constitutional?" Both questions were answered "Yes".

11 Del.C. § 571 provided that whoever committed the crime of first degree murder as defined therein "shall suffer death." 11 Del.C. § 3901 provided: "In all cases where the penalty for crimes prescribed by the laws of this State is death, if the jury, at the time of rendering their verdict, recommends the defendant to the mercy of the Court, the Court may, if it seems proper to do so, impose the sentence of life imprisonment instead of death."

The questions certified seem to have been adroitly phrased to elicit the answers which were given. The true question was whether *Furman* had invalidated the death penalty provision of the Delaware statute. All justices (3) of the Supreme Court of Delaware concurred in answering the certified questions as stated above. The majority (2) held that the death penalty could not be applied retroactively to the defendant in the case under consideration. This is an excerpt from the majority opinion: "Having determined that the mandatory death penalty provision of the Murder Statute, standing alone, may not be applied retroactively, we are left with the problem of pointing to the statutory, common law, or inherent power of the Superior Court under which the sentence may be imposed upon a conviction of murder in the first degree for which the mandatory death penalty of the Murder Statute may not be imposed. That question was not certified and was not briefed or argued by counsel." Chief Justice Wolcott dissented from "the majority's conclusion that 11 Del.C. § 571 may not be applied retroactively by the courts of this State." His dissent is based on this premise: "The Supreme Court of the United States—not this Court—has held that the Mercy Statute is unconstitutional. We, of course, are bound by this decision, but we have not made it." Suffice to say, in my view *Furman* held only that *the death penalty provision* of the Delaware statute was invalid. Therefore, as I see it, the holdings of the Supreme Court of Delaware in Dickerson were not required or supported by *Furman*.

I agree that the *Furman* decision has not established the proposition that capital punishment under all circumstances constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Moreover, nothing in the *Furman* decision would seem to invalidate a statute of our General Assembly prescribing death as the sole and exclusive punishment for murder in the first degree, rape, burglary in the first degree, or arson. Whether such a statute should be enacted is for legislative determination. The majority opinion states: "We recognize that the Legislature, not the courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of the death penalty is a question for the lawmaking authorities rather than the courts." With that statement I emphatically agree. However, in their directive that death shall be the sole and exclusive punishment for all crimes of first degree murder, rape, first degree burglary, and arson, committed *after the filing of this decision*, the majority, in my view, have assumed to act in a legislative rather than in a judicial capacity. Thereby they demonstrate the difference between precept and practice. Of course, the practical effect of today's decision is to place upon those members of the General Assembly who favor the abolition or limitation of capital punishment the burden of initiating and passing legislation to that effect.

It is my view that, unless and until G.S. § 14-17, G.S. § 14-21, G.S. § 14-52, and G.S. § 14-58 are amended by our General Assembly, *Furman* requires that trials be conducted solely to determine the guilt of the defendant; and, if found guilty of murder in the first degree, rape, burglary in the first degree, or arson, that the defendant be sentenced to life imprisonment as the only permissible punishment.

HIGGINS, Justice (concurring in result).

A Court opinion must reflect the views of the majority of the Court. A concurring in result opinion may reflect the individual views of the writer.

In my opinion, Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, does not work any change in North Carolina trial procedure. The decision deals with punishment only. Hence in what are now our four capital felonies the trial court should, as in other cases, omit any reference to punishment and charge on the constituent elements of the offenses and instruct the jury under what circumstances a verdict of guilty should be returned. As a result of the Court's holding in Furman, a charge on the right of the jury to recommend life imprisonment is now an idle gesture and should be omitted. The recommendation is not authorized until the jury unequivocally finds guilt. A conviction without a jury recommendation now requires life imprisonment and permits nothing more.

After discussing the effect of the 1949 amendment giving the jury power to recommend life imprisonment in our four capital felony cases, the majority opinion concludes: "It is the proviso, and the proviso alone, which creates the discretionary difficulty continued by the Furman decision; and it is quite clear that Furman strikes down the proviso as violative of the Eighth and Fourteenth Amendments."

I do not so interpret the effect of Furman. That decision does not strike down the proviso and does not hold that it violates the Eighth and Fourteenth Amendments. Furman holds that after the jury determines guilt and the State law permits either the court or the jury discretion whether the punishment shall be death or life imprisonment, life imprisonment must be imposed. Where discretion is given, Furman holds that a life sentence is valid but strikes down the death penalty. The rationale of the rule seems to be that if discretion between a death sentence or life imprisonment is given either to the court or the jury, the milder punishment must be imposed because in the interpretation of criminal statutes that which is the more favorable to the accused must be accepted.

The fixing of punishment for crime is a legislative function. The General Assembly, in my view, may fix death as the punishment for either or all of the four offenses named in Article XI, Section 2 of the North Carolina Constitution. The Legislature may provide the death penalty or it may provide life imprisonment, but when it undertakes to give an option, the milder judgment must be imposed.

In my opinion, this Court can no more strike out the proviso for life imprisonment than it can strike out the death penalty. Both provisions were inserted in the law by the General Assembly. I am unfamiliar with any authority this Court has to legislate on the subject by repealing either provision.

This further objection to the opinion: After the Court has "eliminated" the right of the jury to recommend life imprisonment in this case, the Court further decrees that capital punishment shall be restored after this Court's opinion is handed down. This holding seems to be required in order that the Court may dig itself out of the hole it fell into by its holding that Furman "strikes down the proviso as violative of the Eighth and Fourteenth Amendments." Furman, as I understand it, holds that life imprisonment is valid, but because of the option, Furman strikes down the death penalty.

[1-4] Since writing the above I have read the well documented opinion of the Chief Justice. I fully concur therein.

LAKE, Justice (concurring).

I concur in all parts of the opinion of Justice Huskins. In view of the length of the dissenting portion of the opinion of the Chief Justice and of the number of author-

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ting portion of the opinion of the
tice and of the number of author-
ities cited therein, and because of the importance of the issue, I deem it advisable to state, as briefly as possible, why I do not find its argument persuasive or the citations convincing upon the question with which the opinion of Justice Huskins deals.

The jury having returned a verdict of guilty of rape without making a recommendation that the defendant's punishment be life imprisonment, a sentence to death was imposed by the trial court pursuant to G.S. § 14-21. It is, therefore, our duty to determine the effect now to be given that statute by the courts of North Carolina. We may not properly bypass that task, nor escape our responsibility for it by labeling the question one of policy for determination by the Legislature.

The Supreme Court of the United States being the higher authority on the validity of judgments under the Constitution of the United States, its mandates, issued in reliance upon Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, vacating the death sentences previously affirmed by this Court in the five cases cited in the opinion of Justice Huskins, became the law of those five cases. Under the compulsion of those mandates, this Court remanded those cases to the respective superior courts for the imposition of sentences of life imprisonment.

The present case, on the contrary, is before us for the first time. In it we have no mandate from the Supreme Court of the United States vacating the death sentence imposed upon this defendant. In the absence thereof, it is our duty, not that of the Legislature, to determine just what the United States Supreme Court decided in Furman v. Georgia, supra, and to determine the present state of the law of North Carolina with reference to punishment for the crime of rape in the light of that decision.

Only this Court can determine whether any portion of G.S. § 14-21 is the law of North Carolina today and, if so, which portion. The Legislature, now in session, cannot make that determination. The Legislature can determine what the law of this State ought to be and shall be in the future. That is policy making and that is the Legislature's prerogative and responsibility. It is for us, and for us alone, to determine what part of G.S. § 14-21, if any, is the law of North Carolina today and determinative of the validity of the sentence from which this defendant appeals. That is not policy making but the interpretation of the statute—an exercise of the judicial function which we may not abdicate or assign to the Legislature. Constitution of North Carolina, Art. I, § 6; Art. IV, § 1.

It is quite clear, as the opinion of Justice Huskins plainly states, that it is for the Legislature, not for this Court, to determine the policy of this State as to what acts shall be deemed crimes and as to the punishment therefor; that is, to determine what punishment ought to be and shall be imposed for the offense of rape hereafter committed. Constitution of North Carolina, Art. I, § 6; Art. II, § 1; Art. XI, § 2. But the Legislature has spoken in G.S. § 14-21 and, until it speaks again, it is the duty of this Court to determine what if anything, remains of its pronouncement in G.S. § 14-21 after the decision in Furman v. Georgia, supra. No officer or agency, save this Court, can make that determination.

The determination of that question as stated in the opinion of Justice Huskins is, in my view, unassailably correct. If the Legislature, now sitting, deems the result of our determination unwise, as a matter of policy, it may, as to rapes hereafter committed, adopt and promulgate a different rule as to punishment. That is its responsibility, not ours.

The opinion of the Chief Justice states:

"If *Furman* had decided that the portion of G.S. 14-21 quoted above was separable and invalid and that death is now the sole and exclusive punishment for rape, such decision would apply to all

rapes committed subsequent to 29 June 1972, the date *Furman* was decided. But this was not the decision in *Furman*."

Of course, it was not, for the simple reason, if for none other, that the Supreme Court of the United States does not have the authority to decide that question. Whether a statute is severable or inseparable is a question of statutory interpretation. It is well settled that the interpretation of a state statute is a question to be determined by the supreme court of the state. The Supreme Court of the United States has repeatedly accepted as binding upon it the interpretation placed upon state statutes by the highest courts of such states.

Thus, the Supreme Court of the United States has not said, and may not properly determine that G.S. § 14-21 is or is not severable. What it has said in Furman v. Georgia, supra, is that the discretion which the proviso in G.S. § 14-21 undertook to vest in North Carolina juries cannot be conferred upon them consistently with the Fourteenth Amendment. It having so held, it is now the prerogative and duty of this Court, and this Court alone, to determine whether the proviso is severable from the original statute unto which the proviso was attached by amendment in 1949. Thus, it is the date of the decision of that question by this Court—today—not the date of the decision in Furman v. Georgia, supra, which fixes the offenses of rape for which a death sentence may be imposed without running afoul of the Ex Post Facto principle.

The opinion of the Chief Justice further states:

> "*Furman* simply held that *the death penalty provision* of G.S. 14-21 as now constituted was invalid and that absent amendment, no death sentence can be constitutionally imposed and carried out."

I do not find the words, "absent amendment," in any of the nine opinions by the justices in Furman v. Georgia, supra, nor in the per curiam statement of the decision therein. Furman v. Georgia, supra, did not hold "the death penalty provision of G.S. 14-21" invalid. It held, as the opinion of Justice Huskins states, that the death penalty cannot be imposed *at a time when juries or judges are given the discretion to impose the death penalty on one defendant and life imprisonment on another for the same offense*—quite a different thing.

I am unable to agree with the reasoning by which the Chief Justice reaches the conclusion that the defeat in 1971 of the legislative proposal to abolish the death penalty for rape and make life imprisonment the mandatory punishment therefor now compels us to hold that, since Furman v. Georgia, supra, life imprisonment has become the mandatory punishment for the crime. Quite obviously, the 1971 Legislature preferred, as a matter of policy, to leave North Carolina juries in possession of the discretion which the 1949 amendment to G.S. § 14-21 attempted to give them. It seems to me perfectly clear that the 1971 Legislature did not believe the then prophesy that the United States Supreme Court would decide as it did in Furman v. Georgia, supra. As the opinions of the four dissenting justices in Furman v. Georgia, supra, show, the earlier decisions of the Court afforded ample basis for such legislative disbelief. However, in any event, the Chief Justice's opinion, if adopted by this Court, would result in our declaring G.S. § 14-21 now to mean precisely what the 1971 Legislature expressly refused to make it say. This we may not do. The Legislature of 1971 obviously wanted the whole of G.S. § 14-21, including the proviso, which it believed constitutionally permissible, but this is far from showing it wanted the whole or nothing. It certainly fails to show that, if unable to have the whole, it wanted the part which it refused to adopt, standing alone, in preference to the part which it refused to repeal.

The array of decisions from other states, cited in the opinion of the Chief Justice, are simply not in point on the question of the severability of G.S. § 14-21. In the

Furman v. Georgia, supra, did "the death penalty provision of]" invalid. It held, as the opinion Huskins states, that the death annot be imposed *at a time when judges are given the discretion to e death penalty on one defendant imprisonment on another for the nse*—quite a different thing.

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ray of decisions from other states, the opinion of the Chief Justice, y not in point on the question of ability of G.S. § 14-21. In the first place, substantially all of them, if not all, held only that the death penalty may not be imposed by a state in a case which arose and was adjudicated while the state undertook to give its juries the discretion which Furman v. Georgia, supra, held cannot be vested in juries. In so holding these decisions do not conflict with the opinion of Justice Huskins. In the second place, of all the cited decisions only those from Mississippi and Florida appear to contain any discussion of the question of the severability of the various state statutes involved and the Mississippi and Florida decisions appear to rest on the acceptance by those courts of the view that their statutes were severable and the life sentence provisions therein were the parts which survived the decision in Furman v. Georgia, supra. In the third place, decisions from other states as to the severability of their statutes cannot help us materially in determining whether our own statute is severable, even if the wording of the statutes be identical, because the legislative history of the respective statutes may well be quite different. As the opinion of Justice Huskins demonstrates, the history of G.S. § 14-21 leads to the conclusion that the proviso, added by the amendment of 1949, is severable from the remainder of the statute.

It is one thing to hold, as the Mississippi and Florida Courts appear to have done, that a statute like G.S. § 14-21 is severable and the part which survives Furman v. Georgia, supra, is that providing for a life sentence. This would, as Justice Huskins has demonstrated, simply be a most strained and improbable view of the intent of the North Carolina Legislature in the light of its repeated refusals to abolish capital punishment. It is a far different thing to say, as the opinion of the Chief Justice suggests, that G.S. § 14-21 is an inseparable whole.

If this view suggested in the opinion of the Chief Justice were correct, it would necessarily follow that the imposition of a sentence to imprisonment for life would be unlawful. It is well settled, as shown by the authorities cited by Justice Huskins, that if the provisions of a statute are, indeed, so inter-related that they are an inseparable whole, the statute cannot be partly unconstitutional and partly constitutional. Quite obviously, the effect of Furman v. Georgia, supra, is that G.S. § 14-21 is not, in its entirety, constitutional. If it be inseparable, then the entire statute would fall under the impact of Furman v. Georgia, supra, and G.S. § 14-21 would authorize no sentence whatever. In that event, rape being a felony at common law and no specific punishment being provided by a valid statute, G.S. § 14-2 would apply and the maximum sentence for rape would be imprisonment for ten years plus a fine.

Of course, the real thrust of the opinion of the Chief Justice is not that G.S. § 14-21 is inseparable but that it is separable and that the proviso is the surviving portion. This I find inconsistent with the legislative history of the statute, correctly set forth by Justice Huskins.

SHARP, Justice (concurring in the opinion of Chief Justice BOBBITT).

[1-4] I concur fully with the views expressed by the Chief Justice in his well-documented opinion and in his conclusion that the effect of *Furman* is to invalidate the death penalty under the laws of this State as presently written and to make life imprisonment the punishment for first degree murder, rape, arson, and first degree burglary. In signifying my concurrence I add these comments:

In my view, there are no constitutional infirmities in capital punishment *per se* and, under the conditions prevailing today, I do not consider the death penalty cruel and unusual punishment for the crimes for which the State Constitution authorizes the General Assembly to prescribe it. Thus, were I to permit my personal views on capital punishment as a State policy to dictate my decision in this case, I would have

voted with the majority. This, however, I am not at liberty to do.

The majority decision is based upon the supposition that in 1949, when the legislature *rewrote and re-enacted* G.S. § 14-21, it would have left the statute unchanged had it known the United States Supreme Court would invalidate the death penalty as authorized in the rewritten section. With all deference, I do not attribute to the majority such occult powers. They cite the failure of seventeen bills or resolutions introduced in the General Assembly to abolish or limit capital punishment. However, they fail to mention the similar fate of the two Judicial Council bills which, in 1969 and 1970, sought to repeal the power of commutation which the legislature had given the jury trying a capital case and to make the death sentence mandatory for the four crimes. In short, the legislature rejected the proposal that capital punishment be retained without the discretionary power in the trial jury to determine whether the convict's sentence should be death or life imprisonment.

The question of capital punishment is one of high public policy, and the constitutional mandate is that it shall be determined by the legislature—not by the judiciary. N.C.Const. art. I, § 6 declares: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." The history of the Supreme Court of North Carolina has been one of judicial restraint and strict adherence to the doctrine of the separation of powers. Our opinions abound with declarations that public policy is the exclusive province of the legislature and its determination is not subject to judicial review; and that the wisdom or impolicy of the law is solely for the legislature and we have neither the power nor the desire to usurp its prerogative. *See* 2 North Carolina Digest Const. Law §§ 6, 10 (1957) and cases cited therein.

This Court, which has consistently deplored the encroachment of other courts upon the legislative prerogatives during the past decade, now follows suit and sets its own example of judicial overreaching by changing the penalty for rape, first degree murder, arson and first degree burglary "from death or life imprisonment in the discretion of the jury to mandatory death." The majority concede that this is "an upward change of penalty" which cannot be applied retroactively. Thus, while giving lip service to the doctrine of separation of powers, this Court does today what the legislatures of 1969 and 1971 declined to do. Had this action been taken by the General Assembly, I would have neither legal nor personal objections. However, when the Court takes such action, in my view, it violates fundamental constitutional principles. I therefore dissent from the conclusion reached by the majority in the advisory opinion.

STATE of North Carolina

v.

Johnny MARSH.

No. 7310SC145.

Court of Appeals of North Carolina.

Jan. 31, 1973.

By a judgment of the Superior Court, Wake County, Coy E. Brewer, J., defendant was convicted of felonious larceny of an automobile and he appealed. The Court of Appeals, Vaughn, J., held that evidence relating to theft of automobile, the finding of a junked chassis and part of body which had belonged to stolen vehicle which was found parked in front of defendant's residence and which contained identification papers in name of defendant was sufficient to sustain conviction.

No error.

APPENDIX C

State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974)

STATE of North Carolina

v.

Henry N. JARRETTE.

No. 46.

Supreme Court of North Carolina

Feb. 25, 1974.

Defendant was convicted in the Superior Court, Union County, John D. McConnell, J., of first-degree murder, rape, and kidnapping, and he appealed. The Supreme Court, Lake, J., held that refusal to sever charges was not error, that denial of motion for change of venue was not an abuse of discretion, that permitting prosecutor to ask prospective jurors their views concerning death penalty was not error, that juror who saw television news report about case was competent to sit, that admission of evidence showing that defendant was an escaped prisoner was not error, that refusal to submit to jury, lesser included offenses of rape and homicide was not error, and that imposition of death penalty was not a violation of the Federal Constitution.

No error.

Bobbitt, C. J., filed an opinion dissenting as to death sentences in which Higgins, and Sharp, JJ., joined; Sharp, J., filed an opinion concurring further in the dissenting opinion of Bobbitt, J.

1. Criminal Law ⇐=620(1)

Consolidation of cases arising from a continuing criminal episode is within discretion of trial judge. G.S. § 15-152.

2. Criminal Law ⇐=620(1)

Consolidation of charges of murder, rape, kidnapping and armed robbery was not error, where such crimes constituted a continuing criminal episode occurring during a two and one-half hour time span. G.S. § 15-152.

3. Criminal Law ⇐=121

Jury ⇐=70(3)

Motions for removal of cases to another county for trial or for summoning of special venire from another county were directed to discretion of trial court.

4. Criminal Law ⇐=121

Jury ⇐=70(1)

Trial court did not abuse its discretion in denying motions for removal of cases to another county for trial and, on denial of that, for summoning of special venire from another county based on ground that defendant could not obtain fair and impartial trial in county because of publicity in various news media concerning offenses, where such newspaper stories were factual and well within normal limits of newspaper reporting of criminal activity and were not inflammatory in nature. G.S. § 1-84.

5. Criminal Law ⇐=109(1)

County in which kidnapping occurred was proper venue for trial of kidnapping charge.

6. Criminal Law ⇐=145

Venue may be waived by a defendant and is waived by his going to trial without requesting transfer to proper county.

7. Criminal Law ⇐=150, 913(1)

Defendant's motion to remove prosecution for rape, murder and kidnapping from Union County on ground of local prejudice was not a request to transfer case to Mecklenburg County which was proper venue for trial of kidnapping charge; thus, placing defendant on trial in Union County was not ground for new trial on charge of kidnapping.

8. Jury ⇐=131(13)

Motion that prospective jurors be questioned separately out of presence of other selected or prospective jurors was addressed to sound discretion of trial judge.

9. Jury ⊂⇒131(13)

Denial of pretrial motion that prospective jurors be questioned separately out of presence of other selected or prospective jurors was not an abuse of discretion.

10. Jury ⊂⇒131(3)

Prospective jurors may be asked questions which will elicit information not, per se, a ground for challenge in order that the party, propounding the question, may exercise intelligently his peremptory challenges. G.S. § 9-15.

11. Jury ⊂⇒131(6)

Allowing prosecutor in prosecution for murder, rape and kidnapping to ask jurors if they had any moral or religious scruples or beliefs against imposition of death penalty was not error.

12. Jury ⊂⇒108

Sustaining of solicitor's challenges to five prospective jurors who stated on voir dire that they were unable to return a verdict imposing death penalty under any circumstances was not error.

13. Criminal Law ⊂⇒607

A mistrial is not lightly granted; granting of motion for mistrial rests largely in discretion of trial judge.

14. Jury ⊂⇒142

Denial of motion for mistrial based on statement of prospective juror who, in presence of other prospective and selected jurors, stated he believed he read that defendant had been declared an outlaw, who later stated he had no opinion as to defendant's innocence or guilt and who was never challenged for cause was not error.

15. Jury ⊂⇒103(3)

Even though prospective juror challenged for cause stated that he had seen television news report about case the night before he was called into jury box, where juror held no preconceived idea concerning defendant's guilt or innocence and told court that he could give defendant a fair and impartial trial without being influenced by what he heard on television report, juror was competent to serve.

16. Criminal Law ⊂⇒366(2)

Homicide ⊂⇒169(3)

Hearsay testimony of homicide victim's brother that victim, at time he borrowed brother's automobile and immediately before driving off in automobile, stated he was going to launderette in particular city was admissible under exception to hearsay rule permitting admission of declarations of decedent to show his intent and was also admissible as part of res gestae of the borrowing and departure.

17. Criminal Law ⊂⇒1169.1(9)

Even if hearsay testimony of homicide victim's brother that victim, at time he borrowed brother's automobile, stated that he was going to launderette was not admissible as an exception to hearsay rule, where only effect of such evidence was to tend to identify victim as boy whom defendant stabbed and other evidence in case established such fact beyond controversy, admission of evidence was, at most, harmless error.

18. Criminal Law ⊂⇒339

Evidence was sufficient to support findings that in-court identification of defendant by police officer was based on what officer saw in the course of his pursuit of automobile and its driver and not on photographs shown officer at subsequent time.

19. Criminal Law ⊂⇒339

Refusal to strike police officer's in-court identification of defendant was not error, where in-court identification was based on what police officer saw in course of his pursuit of automobile and its driver and had origin independent of subsequent showing of photographs to officer, evidence did not indicate a substantial likelihood of irreparable misidentification due

to officer's inspection of photographs and officer's identification of defendant as man he pursued was corroborated by other evidence.

20. Criminal Law ⇐1158(4)

Where evidence on voir dire examination supported trial court's findings that FBI agents conducting interrogation advised defendant of his rights and that defendant waived such rights and made statements freely and voluntarily, such findings were conclusive on appeal.

21. Criminal Law ⇐518(3)

An in-custody confession is competent if made voluntarily after defendant has been given proper warning of his constitutional rights and free full knowledge thereof.

22. Criminal Law ⇐376

Where defendant does not take stand as a witness, evidence of his bad character is not competent and State may not introduce evidence showing that defendant committed an involved sexual offense.

23. Criminal Law ⇐507

Even though FBI agent's statement inferring that defendant escaped from prison prior to committing the crimes charged was not responsive to question propounded to him by solicitor, where court, upon defendant's motion, properly instructed jury not to consider such statement, agent's statement was not grounds for mistrial.

24. Criminal Law ⇐1167.11

Even though FBI agent's testimony regarding defendant's oral statement, defendant's written confession and sheriff's testimony concerning oral statement made by defendant referred to defendant having escaped from prison prior to his commission of crimes charged, where defendant's objection to such evidence was general and his motion to strike was directed to entire testimony and document and not to particular references regarding his escape and where admission of such objectionable statements relating to escape did not contribute to defendant's conviction, admission of such evidence did not require reversal of conviction.

25. Criminal Law ⇐1172.2

Failure to include words "or any part" in charge that jury could believe all that witness said or none was a technical omission which could not have affected result and which did not entitle defendant, who did not request further instruction at conclusion of entire charge, to a new trial.

26. Criminal Law ⇐795(1)

Where trial judge fully and accurately defined crime of rape in preceding paragraph of connected charge and insertion of commas before and after the phrase "after placing her in back seat" in charge that defendant should be found guilty if State showed he had sexual relations with victim in back seat of car after placing her in back seat by use of force and without her consent and against her will would make charge completely accurate, giving of charge was not error.

27. Criminal Law ⇐779(1)

It is not necessary for court to submit to jury a lesser included offense or to instruct jury thereon where there is no evidence tending to show defendant may be guilty of such lesser offense.

28. Rape ⇐59(2)

Where all of evidence, including defendant's statements, showed completion of act of sexual intercourse after female victim was abducted with threats to murder her and transported with her hands tied behind her back to lonely spot on rural road and there was no evidence whatever that victim yielded except through fear of serious injury, failure to charge jury concerning lesser included offenses of rape and instructing jury they could return verdict of guilty of rape or a verdict of not guilty was not error.

29. Robbery ⇐1

Where defendant stabbed and killed motorist for purpose of stealing automobile which he was driving, larceny of automobile was robbery. G.S. § 14-87.

30. Homicide ⇐18(5)

Murder committed in perpetration of robbery is murder in the first degree. G. S. § 14-17.

31. Homicide ⇐309(5)

Where all of evidence, including defendant's statement to officers, was to the effect that defendant stabbed and killed motorist for purpose of stealing automobile in which motorist sat and that killing was done with premeditation and deliberation, failure to instruct jury concerning lesser degrees of homicide and giving of instruction that jury could return verdict of guilty of murder in first degree or verdict of not guilty was not error.

32. Homicide ⇐309(1)

Kidnapping ⇐5

Rape ⇐59(1)

Evidence supported convictions of kidnapping, rape and first-degree murder.

33. Arson ⇐45

Burglary ⇐19

Homicide ⇐221

Rape ⇐61

In light of United States Supreme Court decision that death penalty imposed under statute permitting either judge or jury to impose death penalty as matter of discretion is unconstitutional, meaning of statutes which make death a punishment for first degree murder, rape, first-degree burglary or arson but provide that punishment may be life imprisonment if jury so recommends is that a defendant who commits such an offense after date of State Supreme Court's decision invalidating proviso regarding life imprisonment must be sentenced to death with trial judge having no discretion in matter of sentence to be imposed and jury having no authority to fix a different punishment. U.S.C.A. Const. Amends. 8, 14; G.S. §§ 14-17, 14-21, 14-52, 14-58.

34. Courts ⇐91(1)

Determination of what statutes of state mean, with reference to punishments to be imposed for criminal offenses, is not a federal question but a question of state law and the determination thereof by the State Supreme Court is authoritative.

35. Courts ⇐91(1)

Meaning of State Constitution is matter of state law upon which decision of State Supreme Court is final.

36. Courts ⇐31(3, 10)

Question of whether a state statute which makes it mandatory that a defendant, fairly and lawfully convicted of first degree murder or of rape, be sentenced to death violates Eighth and Fourteenth Amendments to Federal Constitution is federal question and determination of question by State Supreme Court is subject to review by the United States Supreme Court. U.S.C.A. Const. Amends. 8, 14.

37. Constitutional Law ⇐70.2(1), 255(1)

Equal protection clause of Fourteenth Amendment makes no distinction between sentences to death and sentences to imprisonment and due process clause of that amendment protects liberty as well as life. U.S.C.A. Const. Amend. 14.

38. Criminal Law ⇐5

Legislature has the authority to abolish the death penalty. Const. 1970, art. XI, § 2.

39. Statutes ⇐223

When Supreme Court decision holding that death penalty was mandatory punishment upon conviction of first-degree murder or rape was well publicized and bills were promptly introduced in legislature to counteract decision and to abolish

Cite as 202 S.E.2d 721

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Criminal Law ⊂=29(3½), 29(4)

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Const. Amend. 14.

Law ⊂=5

Legislature has the authority to abol-
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⊂=279

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death penalty, legislature's failure to pass such bills showed that decision was not contrary to intent of legislature. Const. 1970, art. II, § 2.

40. Criminal Law ⊂=1205

Retribution is a constitutionally permissible ingredient in the imposition of punishment.

41. Constitutional Law ⊂=70.1(10)

It is not function of court to determine most efficacious punishment for crimes of first-degree murder and of rape; that is function of legislature.

42. Homicide ⊂=317

Rape ⊂=64

Mandatory imposition of death sentence upon conviction of first-degree murder or rape meets constitutional standard for attaining goals of criminal punishment.

43. Constitutional Law ⊂=250.2(1), 270

Criminal Law ⊂=1213

Imposition of death penalty upon conviction of first-degree murder or rape is not, per se, a violation of Eighth and Fourteenth Amendments to Federal Constitution. U.S.C.A.Const. Amends. 8, 14; G.S. §§ 14-17, 14-21; Const.1970, art. II, §§ 1, 2.

The defendant was found guilty of the rape of Gwendolyn Blackmon, a 16 year old Negro girl; the first degree murder of David Timothy Parker, a 16 year old white boy; the kidnapping of Gwendolyn Blackmon; and the armed robbery of David Timothy Parker. He was sentenced to death for the rape and for the murder and to imprisonment for life for the kidnapping. Prayer for judgment was continued on the charge of armed robbery, the State having relied upon this felony as an essential element of the murder in the first degree. The defendant appealed from all three of the judgments imposed, setting forth 126 assignments of error, many of which were abandoned in his brief. Many others present the same question of law.

Prior to the selection of the jury, the defendant made certain pretrial motions, including a motion for change of venue. From exhibits offered by the defendant in support of this motion, it appears that on 9 February 1973 the defendant was serving a sentence of 25 to 28 years at Odom Prison for two burglaries by stabbing with a knife, a circumstance not disclosed by the evidence presented to the jurors of the jury in the present cases. It further appears from these exhibits that he was permitted to leave the prison on that date to attend a state convention of the Junior Chamber of Commerce (Jaycees), he being an officer in the chapter of that organization established in Odom Prison. While at the convention, he eluded the guard who had accompanied him and escaped. Two days later, he was in Charlotte and engaged in the activities from which the present charges arise. Four days thereafter, he was arrested by agents of the Federal Bureau of Investigation in Memphis, Tennessee. Waiving extradition, he was returned to Union County for trial.

The defendant offered no evidence before the jury. That introduced by the State showed, in substance, the following:

At approximately 3:30 p. m. on Sunday, 11 February 1973, Gwendolyn Blackmon, a 16 year old Negro high school student, drove alone in her automobile to the Charlotte Public Library. As she was getting out of her car in the parking lot, a man, whom she had never seen before but whom she positively identified, in court, as the defendant, pushed her back into the car, telling her that if she screamed or did not "go along with what he said," he would kill her, tied her hands behind her back, showed her a "scout knife," compelled her to lie down on the seat, took her keys from her purse and drove off with her in the car, telling her he was a sex maniac.

Upon arriving at a location, subsequently pointed out by Gwendolyn Blackmon to the sheriff, on a dirt road in rural Union County, the defendant put the girl into the back seat of the car, disrobed her completely and, with the knife at hand, had sexual intercourse with her, following which he committed an unnatural sexual act upon her. When, prior to these acts, she begged him not to touch her, he replied that he "didn't like for people to beg him, so please stop begging." Following these acts, he instructed her to get dressed and, when she did so, he retied her hands behind her back. They returned to the front seat of the car and the defendant drove to the town of Waxhaw. En route, he told her he wished she were white because, if she were, he would kill her, but "if he can't find a way of getting another car," he would give her car back to her and let her go free.

Arriving at the launderette in Waxhaw, the defendant parked beside another car, a 1971 Pontiac Grand Prix, yellow with a cream vinyl top, in which a 16 year old white boy, David Timothy Parker sat alone. The defendant, taking the keys to Gwendolyn Blackmon's car with him, and leaving her in her car with her hands still tied behind her back, walked over to the boy's car. The Parker boy rolled down his window and the defendant engaged him in a brief conversation. The defendant then pulled the knife from his pants and stabbed the boy twice. The boy tried to get out of the other side of his car but was unable to do so. The blood was gushing from his mouth and nose. The defendant shoved the dying boy over into the passenger's side of the front seat, got in the car and drove away. He returned momentarily to untie Gwendolyn Blackmon's hands and give her back the keys to her car. Thereupon, she returned to her home in Charlotte and reported what had happened to her parents and to the police.

At about 5:00 p. m. that afternoon, David Timothy Parker had borrowed his brother's 1971 Pontiac Grand Prix, yellow with a white vinyl top, saying he was going to the launderette. On 13 February, his body was discovered in a roadside ditch, 5.4 miles from the Waxhaw launderette. The cause of his death was a deep stab wound in the left chest. The Parker automobile was discovered in Charlotte, the night of 11 February. Its interior was quite bloody. No one other than David Timothy Parker had the owner's permission to drive it.

At approximately 9:00 p. m. on 11 February, Charlotte Police Officers Griffin and Callahan, while patrolling in a police automobile, observed the Parker car parked beside a telephone booth and a man, identified, in court, by Officer Griffin as the defendant, standing in the booth. They turned into the parking lot. As they drove near the Parker automobile, the defendant drove away in it. The officers pursued him with their blue light flashing and horn blowing. They bumped the Parker car several times in unsuccessful efforts to stop it. Finally, the defendant slowed down, jumped from the car and fled on foot. He was pursued by Officer Griffin but escaped by climbing over a fence which the officer was unable to climb. On the ground at that point, Officer Griffin found a coat containing a name plate bearing the defendant's name. The coat was identified by Gwendolyn Blackmon as the one worn by her assailant. A "hunting knife" was found in the glove compartment of the Parker automobile by the police officers. It was not there when the vehicle was lent by its owner to David Timothy Parker. It was identified by Gwendolyn Blackmon as the knife used by her assailant in her abduction and in the stabbing of David Timothy Parker.

On 18 February, F.B.I. Agents Pitts and Cooper located and arrested the defendant in Memphis, Tennessee, a warrant charging unlawful flight having been issued for his arrest. The defendant was then carrying in his pocket a kitchen knife with a six-inch serrated blade. Following a voir dire examination, duly conducted

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the trial court found that the defendant had been given the full Miranda warning by these officers, had signed a written waiver of his right to counsel prior to interrogation by them, was then not under the influence of intoxicating beverages, was experienced in matters of police interrogation, was well versed in his constitutional rights, was not threatened or promised any reward and signed voluntarily a written statement, which statement was admitted into evidence. It was to the following effect:

With no beliefs anything happening, the defendant walked away. By "hitching" rides and walking by foot, he arrived in Charlotte. There he saw a Negro girl pulling out of her car near the library. "told her to close door and not to holler" or he would hurt her, took her in her car out into the country and there "made love" to her after explaining that he did not want to hurt her. Then he drove on with the girl in her car, to Winslow where they rescued a white boy sitting in a car in the parking lot at a hamburger. He decided to kill them to the other whole, got out, approached the boy, explained how he had a flat tire and asked the boy to help him. The boy started to run and he stabbed him once in the back. He then went to the passenger's side where he did it two or three times, and then left with the boy's car in the opposite direction. After driving around fifteen or twenty minutes he put the body in the ditch and proceeded back to Charlotte where he dropped off a telephone book, and called his mother in Tennessee. After leaving the telephone booth he was observed and should be taken officers whom he feared. He stole another car in Charlotte and drove to Knoxville, Tennessee, where he took a bus to Memphis.

Thereafter, in an oral statement, also found by the court to have been made voluntarily, following the full Miranda warning, the defendant told three F.B.I. agents that after having Watkins with the body of the Parker boy in the car, he became stuck in a ditch due to snow; a motorist, passing by with his wife and several children, stopped and helped him to get out of the ditch; had the motorist observed the body of the Parker boy in the car, the defendant "would have had to kill the man and his family." He further stated to Agent Cooper that he felt no guilt at the murder of the young boy in Waxhaw, and that if he had the opportunity he could kill Agent Cooper.

On the evening of 11 February, Constable Blackmon came to Sheriff Hooker of Union County a statement concerning the abduction, the rape, the murder and the theft of the Parker car which was eventually the subject of testimony in court, above summarized. She then accompanied Sheriff Hooker to and toured out the place where the rape occurred and the bandstand where the stabbing of the Parker boy occurred. At that time, she told the sheriff her assailant was "a black male, with a medium short build, a mustache" and "a gold tooth with an outline of a star in the center of it." The defendant has such a tooth.

Sheriff Hooker turned the defendant over to the federal officers in Memphis and returned him to North Carolina. After a hearing, duly conducted, the court found as facts that the defendant was given the Miranda warning by the sheriff, signed a waiver of his right to counsel, was told that the officers of any investigation for escape or suicide risk, was intelligent and well educated and that no promises or threats were made to him but that he freely and voluntarily and intelligently made a statement to Sheriff Hooker. Evidence on the voir dire examination supported these findings. The statements of the defendant to the sheriff were then admitted in evidence. It was to the following effect:

The defendant, a colored male born 1 October 1954, completed 12 grades in school. On 9 February 1973 he "escaped from Odom Prison." He went to Charlotte and on 11 February he was "a small

black girl" getting out of her car and told her to get back in. She "believed" and he told her to shut up or he would hurt her. She then got back in her car and he tied her hands behind her, told her to lie down in the car, which she did, and he drove away with her. After driving about 12 miles into the country, he told the girl he wanted her car and she could get out but she would not leave her car. He then drove onto a dirt road and pulled and told the girl "to the back seat" he would not hurt her. Thereupon he "got mean" with her, started to undress her, showed a white boy comb to a friend [illegible] he told the girl he'd have to get another one, so he parked beside the theater, went to the driver's side, told the boy he was having car trouble and asked the boy to help him. When the boy refused, the defendant pulled a "pocket knife" from his belt and stabbed the boy twice, once in the upper chest and once in the shoulder. The boy was standing at the defendant when the defendant stabbed him. The wound in the chest killed the boy in two or three minutes. The defendant then told the girl to leave, which she did. Her name was Gwendolyn Blackmon. The defendant then got in the white boy's car and rode around for about 15 minutes before he became stuck in a ditch, from which a passing motorist pulled him. The defendant "was glad the people who pulled him out of the ditch didn't see the body" as he did not know what he might have done to them if they had done so. The defendant then put the body of the white boy in a ditch and drove on to Charlotte where he was captured by but eluded the police officers. Going on to Mocksville he stole another automobile which he drove to Knoxville, Tennessee. From there he went a bus to Memphis where he was arrested.

Griffin S. Humphries by James F. Griffin and Charles D. Humphries, Monroe, for defendant.

Adam Stein, Julius LeVonne Chambers, Jack Greenberg, James M. Nabrit, III, Jack H. Hoxie-Ison, Percy C. Ellis, New York City, and Anthony G. Amsterdam, for the NAACP Legal and Educational Fund, Inc., amicus curiae.

LAKE, Justice.

The principal charge of the bill of indictment and the fact of the murder in question are entirely uncontroverted. On the question of the death penalty for the crime of first degree murder and rape. The defendant's remaining 125 assignments of error are directed to various rulings of the trial court which he contends entitle him to a new trial on all of the charges.

We do not reach the question of the validity of the judgments imposing the death penalty for first degree murder and for rape if the defendant is entitled to a new trial on these charges for the reason that he did not receive a fair trial to ascertain whether he is guilty of these crimes. Therefore, we turn first to those 125 other assignments of error. Many of these are expressly abandoned by the defendant in his brief. Many of the others present the same question of law. Others are purely formal. Due to the gravity of the offenses charged and the punishments imposed, we have carefully considered the entire record and each assignment of error, including those abandoned, to determine whether the defendant is entitled to a new trial on any or all of the charges against him.

Over the objection of the defendant, the State's motion to consolidate for trial the four charges (murder, rape, kidnapping and armed robbery) was granted and the defendant's motion for severance was denied. In these rulings there was no error.

G.S. § 15-152 provides:

"When there are several charges against any person for the same act or

Atty. Gen. Robert Morgan by Associate Atty. E. Thomas Maddox, Jr., Raleigh, for the State.

transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated . . . ."

[1, 2] This statute [illegible] that the joinder of [illegible] which the defendant is charged [illegible] at about 8:00 p.m. on 29 August 1976, and was finished when it was just enough to register [illegible] on subsequent counts [illegible] two and one-half hours. Obviously, the [illegible] criminal episode. [See] State v. Parker, 283 N.C. 561, 196 S.E.2d 497; State v. Turner, 285 N.C. 225, 204 S.E.2d 429; State v. White, 286 N.C. 395, 211 S.E.2d 445; State v. Hageman, 307 N.C. 1, 296 S.E.2d 433. They were so related in time and circumstances as to permit the admission of evidence of each in the trial of the others. State v. Peterson, 292 N.C. 439, 233 S.E.2d 905; State v. Mackie, 289 N.C. 171, 221 S.E.2d 742; State v. Harris, 223 N.C. 697, 28 S.E.2d 232; Stansbury, North Carolina Evidence (Brandis Revision), § 91. Under these circumstances, the consolidation of the cases for trial was within the sound discretion of the trial judge. State v. Yeas and State v. Hyde, 261 N.C. 476, 137 S.E.2d 106.

There was no error in the denial of the defendant's motion [illegible] to try and in the absence of prospective jurors for removal of the cases to another county for trial and, specifically, for the summoning of a special venire from a county other than Union. The ground stated for each motion was that, due to the publicity in the various news media concerning these offenses and the resulting charges against the defendant, it would not be possible for him to obtain a fair and impartial trial in Union County by a jury composed of its residents. In support of his motion, the defendant offered affidavits and copies of stories appearing in newspapers published in Union County and in Charlotte. The State offered, in opposition, a number of witnesses who expressed the opinion that the defendant could receive a fair and impartial trial in Union County by a jury composed of its residents.

The necessary steps were not [illegible] necessary or [illegible] All were [illegible] the normal [illegible] of a criminal [illegible] of counsel arises. Their substance was as follows: On 9 February 1975, the defendant was serving a term in the Ohio State Prison for two murders. While in prison, he became president of a chapter of the Junior Chamber of Commerce (Jaycees), organized within the prison. On 8 February 1975, he was permitted by the prison officials to leave the prison to attend a Jaycee convention in Raleigh, accompanied by a guard. In abuse of the confidence thus placed in him, he killed the guard at the convention and escaped. Two days later, these criminal offenses were carried out. The news of the [illegible] identified the defendant as the perpetrator of all four of them.

These circumstances attracted the attention of all the news media of the State. The defendant offered no evidence that such publicity was more widespread in Union County than in any other county to which the case might have been removed in accordance with G.S. § 1-84. To hold that the defendant could not be tried in a county in which newspapers, carrying stories of the offenses and charges, circulated would preclude trial in any county of the State.

[3, 4] As the defendant concedes, motions were directed to the discretion of the trial court. State v. Parmon, 294 N.C. 42, 188 S.E.2d 321; State v. Yeas and State v. Hyde, supra; State v. Poole, 285 N.C. 329, 153 S.E.2d 19; State v. McKethan, 269 N.C. 81, 152 S.E.2d 345.

There is no indication whatever of abuse of discretion in their denial in the present instance. See: State v. Blackmon, supra; State v. Benson, 277 N.C. 295, 177 S.E.2d 398; State v. Conrad, 275 N.C. 342, 168 S.E.2d 59.

[5-7] We observe, though the defendant did not raise the point, that the kidnaping occurred in Mecklenburg County. Thus Mecklenburg County was the proper venue for the trial of that charge. Venue, however, may be waived by a defendant and is waived by his going to trial without objecting to trial in the proper county. State v. Ray, 274 N.C. 172, 161 S.E.2d 549; State v. Lyles, 271 N.C. 622, 157 S.E.2d 335. The motion for change of venue on the ground of local prejudice is not such a request. Consequently, trial of the defendant on trial in Union County is no ground for a new trial on the charge of kidnaping in this instance.

[8,9] The defendant next argued, prior to trial, that prospective jurors be questioned separately, but in the presence of other selected or prospective jurors. The ground was that the defendant's counsel feared that a prospective juror, in response to a question, might state in the presence of other prospective or presently selected jurors, in fact or in law, a fact or a ruling that would embarrass the defendant's being accorded a fair trial. This motion was denied in the sound discretion of the trial judge. State v. Bryant, 272 N.C. 92, 191 S.E.2d 715; State v. Perry, 227 N.C. 171, 176 S.E.2d 729. There was no abuse of discretion, as we hold.

[10] Defendant's assignments of error relate to questions propounded by the Solicitor to the prospective jurors as to their views concerning the death penalty. No material difference in these questions is suggested by the defendant and we perceive none. Consequently, these assignments will be discussed together. It is to be observed that these assignments relate, not to the sustaining of a challenge by the State but merely to a propounding of a question to the prospective juror. Obviously, prospective jurors may be asked questions which will elicit information not per se, a ground for challenge in order that the party propounding the question may exercise intelligently his or its peremptory challenges. Swain v. Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d 759; State v. Allred, 275 N.C. 154, 166 S.E.2d 53; State v. Atkinson, 275 N.C. 258, 167 S.E.2d 241, cert. den. 396 U.S. 915.

[11] The [illegible] to which the assignments of error are directed are typified by the following question propounded to prospective juror, Mrs. McWhorter:

"Do you have any moral or religious scruples or beliefs against the imposition of the death penalty in certain cases?"

No challenge to a prospective juror was sustained upon an affirmative answer to this question alone. The defendant asserts that would "be all such a case as to bring the case of Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770, 20 L.Ed.2d 776." We do not so construe that the letter or the spirit of the Witherspoon decision. We have held many times that there is no error in permitting the solicitor to propound to prospective jurors questions concerning their views about the death penalty. State v. Rogers, 275 N.C. 111, 165 S.E.2d 245; State v. Vess and State v. Hoke, supra; State v. Spencer, 275 N.C. 28, 165 S.E.2d 481. We consider below the effect on the Witherspoon decision upon rulings of the Superior Court sustaining challenges to prospective jurors following their responses to other questions propounded by the solicitor.

[12] The defendant assigns as error the court's sustaining of the Solicitor's challenges to prospective jurors Rankin, Haight, Mosby, Mrs. McWhorter and Mrs. Furrer, contending that the allowance of such challenges for cause violated "the spirit of Witherspoon." There was no mo-

...but merely to a propounding of a ...on to the prospective juror. Ob... prospective jurors may be asked ...ons which will elicit information not, ..., a ground for challenge in order ...the party, propounding the question, ...exercise intelligently his or its pe... challenges. Swain v. Alabama, ...S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d ...; State v. Allred, 275 N.C. 584, 169 S. ...2d 833; State v. Monroe, 276 N.C. 258, ...27 S.E.2d 241, 245, 9 Cir.

...The [illegible] to which these ...rors are directed are to be ...y the following question propounded ...spective juror, Mrs. McWhorter:

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...terial difference in the questions and answers upon the basis of which these five challenges for cause were sustained. Those here quoted, directed to and given by prospective juror Hanson, after he had stated that he did not believe in the imposition of the death penalty, are typical:

"Q. On account of that moral or religious scruple, or scruples would it be impossible under any circumstances and in any event for you to return a verdict of guilty of murder in the first degree and sign knowing at the time that the defendant would be sentenced to death?

"A. Yes, sir, I couldn't do it.

. . . . . .

"Q. If you were chosen to sit on this jury, are you saying that you would not under any circumstances give any consideration to returning a verdict which would involve the death penalty?

"A. No, sir.

"Q. That is what you are saying?

"A. That is what I am saying, I couldn't do it."

The sustaining of the challenges for cause to these five prospective jurors, in view of their responses set out *ante*, was not a violation of either the letter or the spirit of Witherspoon v. Illinois, *supra*. As the defendant concedes, these rulings were in accord with our decision in State v. Sanders, 276 N.C. 598, 174 S.E.2d 487. They were also in accord with our similar rulings in State v. Anderson, 294 N.C. 261, 168 S.E.2d 390; State v. Watson, 281 N.C. 221, 188 S.E.2d 293; State v. Frazier, *supra*; State v. Dees, 279 N.C. 418, 183 S.E. 2d 671; State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572, and many other recent decisions.

The defendant assigns as error the denial by the Superior Court of his motion for a mistrial due to a response by juror Larry McCoy to a question by the defendant before he was accepted as a juror. After Mr. McCoy had stated that he had heard about the case and probably had read it in the newspaper but had not seen it on television or heard it on radio, the interrogation proceeded as follows:

"Q. At the time you read about it did you form an opinion as to this man's innocence or guilt?

"A. Yes, sir.

"Q. Do you still have that opinion?

"A. No, sir.

"Q. What stage did you cease to have it?

"A. No answer.

"Q. You said you had formed an opinion as to his innocence or guilt but now you do not have it any longer. Did you just forget what you had read—

"A. Yes, sir. I didn't recall exactly what I had read now.

"Q. And you are saying that you cannot now recall what you read about this case?

"A. Not word for word. The main part that I remember was what stuck in my mine [sic], I believe he was declared an outlaw. Is that not true? That's the part that stuck in my mind."

"MR. GRIFFIN (counsel for defendant): I move for a mistrial, your Honor.

"COURT: MOTION DENIED. EXCEPTION.

"Q. Mr. McCoy, as you sit there now do you have an opinion as to this man's innocence or guilt?

"A. No, sir.

"Q. Could you take what you read as being evidence of his innocence or guilt?

"A. No, sir."

The defendant did not elect to challenge this juror for cause or peremptorily. He

had not at that time exhausted his peremptory challenges. Mr. McCoy served on the jury.

This assignment of error is not directed to Mr. McCoy's service on the jury. It is directed to the denial of the defendant's motion for mistrial for his statement, in the presence of other prospective and selected jurors, that he believed, having read that the defendant was [illegible]

[13, 14] A mistrial is not lightly granted. The granting of the defendant's motion therefor rests largely in the discretion of the trial judge. State v. Self, 280 N.C. 665, 187 S.E.2d [illegible] Strong, N.C. Index 3d, Criminal Law § 28. We see no error in the denial of the motion in this instance.

[15] The court denied the defendant's challenge for cause to juror Frank Parker. The ground for the challenge was that Mr. Parker, a resident of the special venire, drove and [illegible] pool was chosen, had seen a television news report that the case the night before he was called into the jury box. Nothing whatever in the proof concerns the nature of the television account so heard, nor does it appear that Mr. Parker had been summoned for jury duty prior to listening to the account. The defendant interrogated Mr. Parker at considerable length and no information was developed indicating any prejudice against the defendant, any preconceived idea concerning his guilt or innocence, or other ground for challenge. After the conclusion of the defendant's interrogation of this juror, the court interrogated him as follows:

"COURT: I'd like to ask him a question. In view of the fact you heard something about the trial on the television last night and this is the time when the jury is being selected, no evidence has been presented, do you feel that you can sit and hear the evidence as it comes from the witness stand and give this defendant a fair and impartial trial without being influenced in any way by what you previously heard?

"A. Yes, sir, I could.

"COURT: Including what you heard last night on the television?

"A. Yes, sir."

There was no error in denying the defendant's challenge for cause to this juror. State v. Fox, 277 N.C. 1, 175 S.E.2d 561; State v. Porterfield, 274 N.C. 547, 164 S.E.2d 575.

Gwendolyn Blackmon, after testifying that the defendant, positively identified in court by her, intruded and raped her, testified that she saw him walk up to his car, with his knife, a white boy sitting in a "1971 Grand Prix, yellow with a [illegible] vinyl top," parked in the parking lot of a hamburger (identified by her as the Lunderette in Waxhaw). She further testified that, as a result, blood packed from the mouth and nose of the boy and the defendant got in the boy's car and, after shoving his body over into the passenger's seat, drove away. The boy so stabbed were a cap similar in appearance to that found on the body of David Timothy Parker as it lay in a roadside ditch some five miles from the hamburgerette.

The Parker boy's brother testified that he, himself, was the owner of such an automobile and had lent it that afternoon to David Timothy Parker. The automobile was recovered that evening by police officers in Charlotte after the defendant, who was driving it, had fled from it. It was heavily blood stained, not having borne such stains at the time the owner lent it to David Timothy Parker. The cause of the Parker boy's death was a stab wound in the chest.

[16, 17] Over objection, the brother of David Timothy Parker was permitted to testify that, when he borrowed the car and immediately before driving off in it, David Timothy Parker said he was going to the hamburgerette in Waxhaw. The ground of

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the defendant's objection was that this was hearsay evidence, which, of course, it is. It is, however, within an exception to the hearsay rule noted by us in State v. Vestal, 278 N.C. 561, 581-583, 180 S.E.2d 755. It was also admissible as part of the *res gestae* of the borrowing and departure. Annot., 163 A.L.R. 13, 21. If it were not admissible under either of these exceptions to the hearsay rule, its admission would be, at most, harmless error. The only effect of this evidence would be to tend to identify David Timothy Parker as the boy whom the defendant stabbed. As above noted, the other evidence in the case established this fact beyond controversy. There is no merit in this assignment of error.

Officer Griffin of the Charlotte Police Department testified that on 11 February 1973 at approximately 9:30 p.m. he and another officer were patrolling in a police vehicle as a result of a call they had received. He observed the Parker automobile parked beside a telephone booth at a service station. In the booth was a Negro male. As the police car pulled into the parking lot for the purpose of questioning the man, he got in his car and drove off. They pursued him and at one point drew parallel with the other automobile on its left side. At that point the other car turned into the path of the police car and struck it, then sped off.

Officer Griffin was seated in the passenger's seat of the police vehicle. Thus, he was immediately next to the driver of the other vehicle when the two cars were parallel and in collision. He testified that he had an opportunity to see the face of the driver of the other vehicle. The police officers continued the pursuit, bumping the Parker car several times in unsuccessful efforts to stop it. Finally, it slowed down and the driver jumped out and fled on foot. Officer Griffin pursued him on foot, drawing within ten feet of him. He unequivocally identified the defendant in court as the man who was driving the Parker car. To this evidence, there was no objection.

On cross-examination, Officer Griffin testified that he saw the defendant at a distance of about ten feet for four to five seconds while pursuing him on foot. There were street lights in the area. He then testified: "My identification of that subject as being the defendant is not based on my observation of that driver for four to five seconds. I am basing my identification on pictures that I saw of the suspect. My identification is not based strictly on what I saw that night." Thereupon, the defendant's counsel moved to strike the officer's in-court identification of the defendant and the court conducted a voir dire examination of the officer.

On such voir dire, the officer testified that his identification of the defendant as the man he so pursued in Charlotte on the night of February 11, 1973 was based upon what he saw that night as he and his companion were chasing the car, that he saw photographs of the defendant later, but his in-court identification of the defendant as the man he so pursued was based "solely on my observation on that night." He then described the appearance of the driver of the other vehicle as he saw him as the car and again identified the defendant as the man he then saw. Upon this evidence, the court overruled the motion to strike. In this ruling we find no error.

[18, 19] Although the trial judge should have made specific findings of fact following the voir dire, his overruling of the motion to strike, under the circumstances, necessarily implies the finding that the in-court identification by the witness was based on what the witness saw in the course of the pursuit of the other vehicle and its driver. The evidence is ample to support such finding. Furthermore, there is nothing whatever in the record concerning the nature of the pictures he saw later, or to indicate that these, or the circumstances under which he saw them, were impermissibly suggestive. The in-court identification had an independent origin. There is nothing to indicate a substantial

likelihood of irreparable misidentification through the subsequent inspection of photographs. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247; State v. Morris, 279 N.C. 477, 183 S.E.2d 634. Finally, as to this point, Officer Griffin's identification of the defendant, as the man he pursued, is corroborated by his finding of the defendant's coat on the ground at the point where the fleeing man jumped over a fence and thus escaped. It is further corroborated by the defendant's own statement to Sheriff Fowler, discussed below.

The next three assignments of error are directed to the admission of statements made by the defendant to the agents of the Federal Bureau of Investigation who arrested and interrogated him.

[20,21] Agent Phelps of the Federal Bureau of Investigation, who arrested the defendant in Memphis, Tennessee, testified concerning both an oral statement and a written statement given by the defendant to the witness as the result of in-custody interrogation. Before admitting this evidence, the court conducted voir dire examinations and made full findings of fact. He found that, before each interrogation, the F.B.I. agents conducting the interrogation gave the defendant the full warning required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. He further found that the defendant signed a written waiver of his constitutional rights, including his right to have an attorney present at the interrogation, and that the defendant made the statements, oral and written, freely, voluntarily and intelligently. These findings, being fully supported by the evidence on the voir dire examination, are conclusive on appeal. State v. Fox, supra; State v. Gray, 268 N.C. 69, 79, 150 S.E.2d 1; State v. Barnes, 264 N.C. 517, 142 S.E.2d 334; State v. Rogers, 253 N.C. 390, 64 S.E.2d 572. An in-custody confession is competent if made voluntarily after the defendant has been given proper warning of his constitutional rights and has full knowledge thereof. State v. Chance, 279 N.C. 647, 661, 185 S.E.2d 227; State v. Murry, 277 N.C. 197, 176 S.E.2d 738; State v. Gray, supra.

The defendant does not contend that the statements were not voluntary or that they were made without full knowledge of his constitutional rights. His contention is that it was error to permit Agent Phelps to read to the jury the written confession, consisting of five pages of detailed account of the defendant's activities from the abduction of Gwendolyn Blackmon to the arrest of the defendant in Memphis, because it includes the defendant's statement: "[W]hile I was attending a JC Day in the General Assembly in Raleigh, North Carolina, at the Hilton Inn, I walked away." It is his contention that this "shows escape and previous conviction," evidence of which would not be admissible.

As a matter of fact, the written confession also states that the defendant telephoned his mother in Louisiana and told her he had "escaped from prison" and that he told the woman, in whose house he was arrested in Memphis, that he "had just got out of prison."

Agent Phelps also testified that, in his oral statement, the defendant "told us that on February 9, 1974 that while he was in Raleigh attending a Jaycee meeting he walked away from the grounds that he was there." The defendant's contention on appeal is that this is also inadmissible evidence of his having committed some prior criminal offense. (At no time was there any evidence before the jury as to the nature of the prior offenses.)

Finally, in this connection, the defendant assigns as error the denial of his motion for a mistrial for the reason that Agent Phelps testified, "We asked Mr. Jarrett if he would relate to us details surrounding the time of his escape until the time [of] his arrest in Memphis]." Again, the contention of the defendant is that such testimony was inadmissible evidence to the effect that the defendant had committed previously some criminal offense. The cir-

nce, 279 N.C. 643, 661, 185 S.E.2d 227; e v. Murry, 277 N.C. 197, 176 S.E.2d State v. Gray, supra.

he defendant does not contend that the ments were not voluntary or that they made without full knowledge of his stitutional rights. His contention is it was error to permit Agent Phelps to to the jury the written confession, sisting of five pages of detailed account the defendant's activities from the ... of the defendant in Memphis, because ... precludes the defendant's statement, [W]hile I was traveling to stay in General Assembly in Raleigh, North lina, at the Raleigh Jaycee meeting I walked ...." It is his contention that this ... escape and previous convictions," ... of which could not be established.

... a matter of fact, the written confes- ... also states that the defendant tele- ...d his mother in Tennessee and told ... he had "escaped from prison" and that ...d the woman, in whose home he was ...ted in Memphis, that he "had just got ... prison."

gent Phelps also testified that, in his ... statement, the defendant told us that ... [o]n January 9, 1978 that while he was in ...gh attending a Jaycee meeting he ...d walked away from the guards that were ...." The defendant's contention on ap- ...l is that this is also inadmissible evi- ... of his having committed some prior ...nal offense. (At no time was there ...evidence before the jury as to the na- ... of the prior offenses.)

...ally, in this connection, the defendant ... to assert the denial of his motion ... a mistrial for the reason that Agent ... testified, "We asked Mr. Jarrette if ...ould relate to us details surrounding ...ime of his escape until the time [of ...rrest in Memphis]." Again, the con- ...n of the defendant is that such testi- ... was inadmissible evidence to the ef- ...that the defendant had committed pre- ...ly some criminal offense. The cir- ...umstances of this ruling are disclosed by ...e record to have been as follows:

After the court had conducted the voir dire examination concerning the defendant's oral statement to the F.B.I. agents, and had ruled evidence thereof admissible, the jury returned to the courtroom and Agent Phelps resumed his testimony. The record shows the following took place:

"Q. Thereafter, after the defendant signed his signature at or near the bottom of State's Exhibit 10 [the written waiver of his constitutional rights], Mr. Phelps, what, if any, statement did he make to you? [Emphasis added.]

"OBJECTION. OVERRULED.

"Q. Go ahead.

"A. At that time we asked Mr. Jarrette if he would relate to us details surrounding the time of his escape until the time— [Emphasis added.]

"OBJECTION.

"COURT: If he would relate to you what?

"A. If he would relate to us the events that evolved from the time he had escaped until the time he was arrested.

"MR. GRIFFIN [defendant's counsel]: Move that that portion 'escaped' be stricken.

"COURT: You will not consider his statement as to 'escaped.'

"Q. Mr. Phelps, my question is what, if any, statement did he make, not what you said.

"MR. GRIFFIN: I'd like to get—

"COURT: You will not consider any statement that Officer Phelps made asking the defendant to relate the events subsequent to an escape.

"MR. GRIFFIN: I would like the record to show that I made a motion to a mistrial at this time.

"COURT: MOTION DENIED. EXCEPTION."

[22, 23] It is, of course, the general rule that upon the trial of a criminal charge, the defendant not having taken the stand as a witness, evidence of his bad character is not competent and, for this reason, the State may not introduce evidence showing that he committed an unrelated criminal offense. State v. McClain, supra; Stansbury, North Carolina Evidence (Brandis Rev.), § 91 (Supp. 1977). Agent Phelps' statement informing that the defendant had escaped from prison was not responsive to the question propounded to him by the Solicitor. Immediately upon motion of the defendant's counsel, the court properly instructed the jury not to consider this statement. We find in this circumstance no ground for a mistrial. State v. Stiff, supra.

Thereupon Agent Phelps, in response to the Solicitor's question, related to the jury the detailed, oral statement of the defendant to him, including the words, "[W]hile he was in Raleigh attending a Jaycee meeting he walked away from the guards that were there." At the conclusion of the witness' answer, the defendant made a motion to strike the entire answer, but not a motion to strike the statement that the defendant had walked away from the guards.

Again, when the defendant's written confession was introduced in evidence, there was a general objection only and, after it was read, a general motion to strike the entire answer. The court was not requested to strike or to instruct the jury to disregard the expressions therein that, while attending the Jaycee meeting in Raleigh the defendant "walked away," that he telephoned his mother and told her he had "escaped from prison" and had told the woman, in whose home he was arrested in Memphis, that he "had just got out of prison."

[24] The earlier ruling by the court, concerning Agent Phelps' nonresponsive

use of the word "escape," shows clearly that, had the defendant requested him to do so, the judge would have stricken from the written confession the above quoted words contained therein. Nothing in the record indicates that these particular expressions in the written document were called to the court's attention. The objection was to the introduction of the document in its entirety and the evidence on the voir dire examinations, conducted with reference both to the oral and to the written statements of the defendant to the officers, gave the court to understand that the defendant's objections were to the statements in their entirety and on the ground that they were impermissibly obtained, not to any specific words therein. "When testimony or a document is inadmissible only in part, the objection should specify the objectionable part; and if it is not so confined, it is not error to overrule it." Stansbury, North Carolina Evidence (Brandis Revision), § 27. In Nance v. Telegraph Co., 177 N.C. 313, 98 S.E. 835, this Court said, "[W]here a part of testimony is competent, although the other part of it may not be, and exception is taken to all of it, it will not be sustained. * * * We will not set off the bid for him, and consider only that much of it, upon the supposition that his objection was aimed solely at the incompetent part."

It will be observed that in these three assignments of error the defendant is not asserting that his constitutional rights have been denied or violated. He does not contend that the statements by him to the interrogating officers were involuntary, or that they were made without full knowledge of his constitutional rights. His contention is simply that, in these instances, evidence tending to show that he had previously committed some undesignated criminal offense was improperly placed before the jury. Under the circumstances, these assignments are without merit.

As the Supreme Court of the United States said in Bruton v. United States, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476, "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unless it is through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.' Lutwak v. United States, 344 U.S. 604, 619, 73 S.Ct. 481, 490, 97 L.Ed. 593."

In Schneble v. Florida, 405 U.S. 427, 432, 92 S.Ct. 1056, 1060, 31 L.Ed.2d [illegible] the Court, after referring to the [illegible] statement in the Bruton case, supra, said:

"Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. * * * In this case, we conclude that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to Snell's confession been excluded. The admission into evidence of these statements, therefore, was at most harmless error."

In view of the detailed [illegible] defendant and the testimony of Gerald Blackmon, it is apparent that had the jury never heard the objectionable statements relating to the defendant's having escaped prisoner, they would have rendered verdicts other than those which they did return.

Sheriff Fincher testified that after he returned the defendant to Union County, he also warned the defendant of his constitutional rights, in compliance with Miranda v. Arizona, supra, and the defendant signed another written waiver thereof, including his right to have counsel present at the interrogation. Thereafter, the defendant made an oral statement which the Sheriff reduced to writing but the defendant did not sign. Upon objection being interposed, the court conducted another full voir dire examination and thereafter made full findings of fact, fully supported by the evidence on the voir dire examination, to the effect that such statement was made

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97 L.Ed. 593."

voluntarily and intelligently, after the giving of the requisite warning concerning his constitutional rights. The court then overruled the objection to the testimony of the Sheriff concerning such statement. The Sheriff thereupon related to the jury the statement so given him by the defendant which included the following:

"I, Henry Jarrette, escaped from Odom Prison February 9, 1973. I, Jarrette, was at the Pierce Day in the General Assembly in Raleigh. I, Jarrette, escaped from the prison on [illegible]. After I escaped, I, Jarrette, went to Charlotte * * *."

Here, again, the objection was general and the defendant's motion to strike was directed to the entire statement. The [illegible] examination of Sheriff Cowart, prior to the introduction of the statement, clearly indicates that the defendant's concern was directed to whether the statement was voluntary and made with a knowledge of the defendant's constitutional rights. For the reasons above mentioned, the assignment of error also is without merit.

The court, in its charge to the jury, said:

"You may believe all that a witness says or you may believe none. You are to weigh the evidence and find where the truth lies. * * *."

[25] The defendant assigns this as error, saying the court should have charged, "You may believe all, *or any part*, or none of what a witness says." (Emphasis added.) While the instruction suggested by the defendant would have been correct, and an improvement upon that actually given, we do not think the jury was misled by the omission of the words "or any part." This was a technical omission, not substantial, and could not have affected the result. Consequently, the defendant is not entitled to a new trial on account of it. State v. Cloud, 278 N.C. 42, 178 S.E.2d 577; State v. Lee, 277 N.C. 205, 176 S.E.2d 765; State v. Gatling, 275 N.C. 625, 170 S.E.2d 593. At the conclusion of its entire charge, the court asked counsel if any further instructions were requested. Both the Solicitor and counsel for the defendant replied in the negative.

[26] The record shows that the court, in its charge to the jury, said:

"If the State has satisfied you from the evidence and beyond a reasonable doubt that on or about the 11th day of February, 1973, the defendant, after tying the hands of Gwendolyn Elliott and carrying her from Charlotte into Union County, and showing her a hunting knife, did by use of force and without her consent and against her will, he would be guilty of rape."

The defendant assigns this as error, contending that under this instruction the jury might have found the defendant guilty of rape if the defendant put the girl in the back seat of the car by the use of force and without her consent and against her will, even though the act of intercourse was not with force and was with her consent. It will be observed that the insertion of commas before and after the phrase "after placing her in the back seat" makes the charge, on this point, completely accurate. The court reporter's punctuation of the judge's charge, standing alone, is not sufficient evidence of error to warrant a new trial. In the immediately preceding paragraph of the charge, the judge fully and accurately defined the crime of rape. It is not conceivable that the jury was misled by the above quoted portion of the charge.

[27] The defendant assigns as error the failure of the trial court to charge the jury that the defendant might be found guilty of assault with intent to commit rape or of assault on a female. There is no merit in this contention. These are

lesser offenses included in the offense of rape. However, it is not necessary for the court to submit to the jury a lesser, included offense, or to instruct the jury thereon, where there is no evidence tending to show the defendant may be guilty of such lesser offense. State v. Carnes, 279 N.C. 549, 184 S.E.2d 283; State v. Murry, supra; Strong, N.C.Index 2d, Criminal Law, § 115.

[28] All of the evidence, including the statements made by the defendant to the arresting officers, to Murphy and to Sheriff Fowler, shows completion of the act of sexual intercourse after the girl was abducted, with threats to injure her if she made an outcry, and transported, with her hands tied behind her back, to a lonely spot on a rural road where the act of intercourse was consummated. The girl's testimony was that at all times the defendant exhibited to her, in hand at hand, the knife with which he subsequently stabbed the Parker boy to death. The defendant's own statements were to the effect that he told her that *if she submitted*, he would not hurt her. There is no evidence whatever that she yielded except through fear of serious injury. Under these circumstances, it was not error to fail to charge the jury concerning the lesser included offenses and to instruct them that on the charge of rape they might return a verdict of guilty of rape or a verdict of not guilty. State v. Bryant, 280 N.C. 521, 526, 187 S.E.2d 111; State v. Carnes, supra; Strong, N.C.Index 2d, Criminal Law, § 115.

[29-31] There was likewise no error in the court's failure to submit to the jury the question of the defendant's guilt of second degree murder, and to instruct the jury thereon. All of the evidence, including the statements by the defendant to the arresting officers and to Sheriff Fowler, is to the effect that the defendant stabbed and killed David Timothy Parker for the purpose of stealing the automobile in which the Parker boy sat and in the accomplishment of that purpose. The larceny of the automobile under these circumstances was robbery. G.S. § 14-87; State v. Ross, 278 N.C. 89, 178 S.E.2d 809. A murder committed in the perpetration of a robbery is murder in the first degree. G.S. § 14-17. State v. Rich, 277 N.C. 333, 177 S.E.2d 422. The evidence, furthermore, shows clearly that the killing of the Parker boy was with premeditation and deliberation. There being no evidence whatever of a lesser degree of homicide, it was not error for the court to fail to instruct the jury concerning the lesser degrees of homicide and to instruct them that, on the homicide matter, they might return a verdict of guilty of murder in the first degree or a verdict of not guilty.

[32] The defendant's remaining assignments of error, relating to the denial of his motions for nonsuit as to each of the charges, to instructions of the court to the jury and to rulings and procedures prior to the entry of the judgments, have all been carefully examined, whether abandoned by the defendant in his brief or not. There is no merit whatever in any of them and would serve no useful purpose to discuss them individually. The verdicts of guilty of kidnapping, rape, murder in the first degree and armed robbery are each fully supported by the evidence. The record shows that the defendant received, on each charge, a fair trial in accordance with the law of this State. The record discloses no basis for disturbing any of the verdicts or the granting of a new trial upon any of the four charges.

We are thus brought to the defendant's principal contention, the sole contention on the amicus curiae, that even though the defendant received a fair trial, free from error, and, consequently, stands properly convicted of murder in the first degree and of rape, it was error to enter judgments on these charges sentencing him to death. To do so, in Case No. 73CR1342 (murder) and Case No. 73CR1339 (rape), the judgments entered should be vacated and the cases remanded for judgments sentencing the defendant to imprisonment for life.

omobile under these circumstances was bery. G.S. § 14-87. State v. Bailey, N.C. 80, 174 S.E.2d 593. A murder mitted in the perpetration of a robbery urder in the first degree. G.S. § 14- State v. Rich, 267 N.C. 333, 147 S.E. 22. The evidence, furthermore, shows ly that the killing in the Parker boy with premeditation and deliberation. re being no evidence whatever of a degree of homicide, it was not error the court to fail to instruct the jury

[2] The defendant's remaining assign ts of error, relating to the denial of his ns for nonsuit, to the exclusion of tes, to the inaction of the court to the ord to indicate the precise point to ntry of the judgment, have all been fully examined, whether abandoned by failure to discuss them or not. There is merit in any of these. It can serve no useful purpose to discuss individually the evidence of guilty adduced against each of the defendants and the defendants' evidence in defense by the evidence. The record shows the defendants received, on each ge, a fair trial in accordance with the of this State. The record discloses no for disturbing any of the verdicts or ntering of a new trial upon any of ese charges.

e are thus brought to the defendant's nal contention, the sole contention of ourteen, that even though the de- ant received a fair trial, free from er- and, consequently, was properly con- d of murder in the first degree and of , it was error to enter judgments on charges sentencing him to death, and in Case No. 73CR1512 (murder) and No. 73CR1513 (rape), the judgments ed should be vacated and the cases re- ded for judgments sentencing the de- ant to imprisonment for life.

It will be noted that this assignment of error has no relation to the judgment imposing a sentence to imprisonment for life in Case No. 73CR2843 (kidnapping). It will also be noted that in Case No. 73CR1341 (armed robbery) prayer for judgment was continued, this offense having been used by the State as an element of the crime of murder in the first degree.

In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, the Supreme Court of the United States held that the cruel and unusual punishments in the Constitution of the United States forbid a state to inflict the penalty of death if, under the law of the state, either the jury or the judge is entitled, as a matter of discretion, to choose between the imposition of the death penalty and the imposition of the penalty of imprisonment. Each of the nine Justices, five concurring in the decision and four dissenting therefrom, wrote a separate opinion. The five Justices concurring in the decision did not agree, except in principles, as to the basis upon which the decision rests.

It is neither the function nor the purpose of this Court to defend or justify Furman, the stated reasons for it or the results which have flowed from it. Our function and intent has been, and is, to comply with it and to determine its effect upon the statutes of North Carolina, which expressly provide what penalty is to be imposed upon a defendant lawfully convicted of first degree murder, rape, first degree burglary or arson. G.S. § 14-17, G.S. § 14-21, G.S. § 14-52, and G.S. § 14-58.

Pursuant to Furman, we have received from the Supreme Court of the United States, and have complied with, mandates to vacate sentences of death affirmed by us prior to that decision. State v. Frazier, 283 N.C. 99, 195 S.E.2d 33; State v. Miller, 281 N.C. 749, 190 S.E.2d 841; State v. Handy and Chandler, 281 N.C. 743, 191 S.E.2d 66; State v. Chance, supra; State v. Westbrook, supra; State v. Davis, 281 N.C. 751, 191 S.E.2d 70. In other cases, reaching this Court after the decision in Furman, involving offenses committed prior to our decision in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, we have, in conformity thereto, vacated death sentences, and, having found no error in the trial, remanded the matters to the Superior Courts for the imposition of sentences to life imprisonment. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431; State v. Watkins, 283 N.C. 594, 196 S.E.2d 750; State v. Waddell, supra; State v. Carroll, 282 N.C. 325, 193 S.E.2d 85. See also State v. Cooke, 283 N.C. 240, 195 S.E.2d 525; State v. Washington, 283 N.C. 175, 195 S.E.2d 502; State v. Tallent, 282 N.C. 216, 194 S.E.2d 822.

Prior to 1949, the imposition of a sentence to death was mandatory, in this State, upon a conviction of first degree murder or rape. In 1949, the Legislature inserted a proviso in the statutes relative to the punishment for first degree murder and rape, similar provisos having been inserted earlier into the statutes relating to first degree burglary and arson. As so amended, G.S. § 14-17 (relating to murder), at the time of Furman, read

> "A murder * * * which shall be committed in the perpetration or attempt to perpetrate any * * * robbery * * * shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

G.S. § 14-21 (relating to rape), as so amended, was to the same effect, so far as punishment is concerned.

At the time Furman v. Georgia, supra, was decided, this Court had held in numerous decisions that the effect of the proviso inserted into these statutes by the 1949 amendment, and the effect of the like provisos previously inserted in G.S. § 14-52 (burglary) and G.S. § 14-58 (arson),

was to confer upon the jury in each case the absolute, "unbridled" discretion to fix the punishment at either death or imprisonment for life. State v. Manning, 281 N.C. 1, 186 S.E.2d 474; State v. Denny, 249 N.C. 113, 105 S.E.2d 446; State v. Conner, 241 N.C. 468, 85 S.E.2d 594; State v. Simmons, 241 N.C. 280, 60 S.E.2d 897; State v. McMillan, 233 N.C. 650, 65 S.E.2d 212; State v. Shackleford, 232 N.C. 209, 59 S.E.2d 825; State v. Mathis, 230 N.C. 598, 53 S.E.2d 668. Thus, Furman held, the State may not do by reason of the Fifth and Fourteenth Amendments to the Constitution of the United States

The question was therefore presented, as a result of Furman v. Georgia, supra, What part of G.S. § 14-17 (murder) and what part of G.S. § 14-21 (rape), if any, remains the law of North Carolina? The question was before this Court and was determined by us in State v. Waddell, supra.

While the decision in State v. Waddell, supra, was not unanimous, the members of this Court were in agreement that the valid G.S. § 14-17 or G.S. § 14-21 in its entirety. All of the members of this Court agreed that Furman, Branch, their statutes remain in the law of North Carolina except, as only in part. The difference of opinion among the members of the Court was as to which part of each such statute remained the law of this State. The majority was of the opinion that the words "or upon conviction of the prisoner added by the 1949 amendment, which attempted to confer upon the jury the discretion forbidden by Furman. It was the view of the majority of the Court that the portion of each of these statutes which survived Furman, and remained the law of North Carolina, was the original provision making the death penalty mandatory and State v. Waddell, supra, so decided. The Supreme Court of Delaware reached the same conclusion as to the effect of Furman v. Georgia, supra, upon the similar statutes of that State. State v. Dickerson (Del.), 298 A.2d 761.

To avoid another, and different, serious question of constitutional validity, should we give State v. Waddell, supra, retroactive effect, we there held that our decision would not be retroactive and that, consequently, the death penalty would be imposed only in cases where the offense was committed after the date of that decision (18 January 1973). To the same effect see State v. Dickerson, supra.

[33] The reasons for our decision in State v. Waddell, supra, are fully set forth in the unofficial [illegible] opinion filed [illegible] counsel here. Having given full consideration to the brief and oral argument of the defendant and to the brief of the State herein, requesting us to reconsider State v. Waddell, supra, we now reaffirm that decision and hold that the sentence of G.S. § 14-17, G.S. § 15-25, G.S. § 15-55, and G.S. § 14-28, in the light of the decision of the Supreme Court of the United States in Furman v. Georgia, supra, to the effect that a defendant, lawfully convicted of first degree murder, rape, first degree burglary or arson, the offense having been committed after 18 January 1973, must be sentenced to death, the trial judge having no discretion in the matter of the sentence to be imposed and the jury having no authority to fix a different punishment.

[34] The determination of what if any statutes of this State exist, which relate to the punishment to be imposed for criminal offenses, is a question of State law and the determination thereof by this Court is authoritative. It is not a Federal question. Addeky v. Florida, 392 U.S. 49, 88 S.Ct. 2142, 20 L.Ed.2d 1295, reh. den., 393 U.S. 1028, 89 S.Ct. 638, 21 L.Ed.2d 570; Whitus v. Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599; Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469; Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837; Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066; Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117; Fiske v. Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108; Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138; Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095; Patterson v. Colorado, 205 U.S. 454, 27 S.Ct. 556, 51 L.Ed. 879.

Having determined that the defendant has been lawfully and fairly convicted of first degree murder and of rape and having determined that G.S. § 14-17 and G.S. § 14-21 require a defendant so convicted to be sentenced to death, the question then becomes whether the imposition of such sen-

peal in this case and has any provision of the Constitution of North Carolina or of the Constitution of the United States.

[35] The Constitution of North Carolina, Article XI, §§ 1 and 2, expressly permits the imposition of the death penalty upon conviction of first degree murder or upon the commission of rape. The meaning of the State Constitution is also a matter of State law upon which the decision of the Court is final.

The contention of the defendant, and of the amicus curiae, is that a State is prohibited under the Eighth Amendment, fairly and lucidly construed of late years, to put to death, as opposed to death, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

[36] Furman v. Georgia, supra, does not so hold, only two of the nine Justices (Mr. Justice Brennan and Mr. Justice Marshall) indicating such a view in their opinions in that case. The other decision of the Supreme Court of the United States on it is not a federal question and no determination of it is subject to review by the Supreme Court of the United States, but as matter of the initial determination and must do so in the light of decisions heretofore rendered by that Court.

The arguments of the defendant and of the amicus curiae, in support of their position on this question, may be summarized as follows: (1) Although G.S. § 14-17 (murder) and G.S. § 14-21 as to rape, as construed in State v. Waddell, supra, to the imposition of the death sentence mandatory upon conviction of first degree murder or rape, the death penalty is nevertheless discretionary and selective because (a) the Solicitor has the power to prosecute for a lesser charge, (b) the jury has the power to acquit or to convict of a lesser charge, and (c) the Governor has the power to commute the sentence or grant a pardon; (2) since our decision in State v. Waddell, supra, the death sentence has been imposed in North Carolina more frequently than was the case prior to the decision in Furman v. Georgia, supra, from which it is concluded that our construction of these statutes is contrary to the legislative intent; (3) nevertheless, since State v. Waddell, supra, was decided, the death penalty has been imposed in such a small number of cases that its imposition is clearly selective and arbitrary; (4) the defendant is entitled to the benefit of State v. Waddell, supra, and should not be subjected to the penalty of death; (5) death is a cruel and unusual punishment because an enlightened public opinion has overwhelmingly repudiated it; (6) the punishment of death is both cruel and unusual.

Although the mere statement of these contentions, in clear and simple terms, seems sufficient to show their lack of substance, the circumstances under which they are advanced require us to take note of each of them briefly.

(1) *The Death Penalty Is Discretionary And Selective.*

As is true of any other criminal charge, a murder case or a rape case begins with a person notifying police officers that the offense has occurred. As the result of ensuing police investigation, the person charged is arrested and, in due time, the matter comes to the attention of the Solicitor. It is his duty to evaluate the information and determine whether to seek an indictment and, if so, for what offense. It is not the Solicitor's duty to seek the indictment or the conviction of the greatest, or to seek the conviction of a person guilty of one crime, upon another and more serious charge of which he is not guilty. It is elementary and fundamental that a defendant is not to be convicted unless his guilt is established beyond a reasonable doubt. The decision of the Solicitor as to the offense for which he will seek an indictment from the grand jury and his decision as to whether to accept, with the permission of the court, a plea to a lesser charge, includ-

ed within the offense specified in the indictment returned, are the results of an evaluation of the available evidence, including its credibility. The Solicitor's decision to charge a defendant with a crime punishable by death if he is convicted, is a solemn one, properly reached only when in the Solicitor's judgment, the evidence of guilt is clear and convincing. This is a human evaluation. There is often room for difference of opinion concerning it. To say, as does the heart of the majority opinion, that because the Solicitor does not bring in every case a verdict of guilty of murder in the first degree, he is guilty of "arbitrary" action, is to say that the high office of Solicitor is the

[illegible]

[illegible]

[illegible]

of the trial judge. The Governor reviews the decision of the jury, which we may not do. The exercise by the Governor of this judgment, resulting in the commutation of the sentence of one man convicted of murder or rape and the refusal to commute the sentence of another convicted of such crime, cannot be called "freakish" or "arbitrary" merely because another Governor might, theoretically, have reached opposite conclusions.

It is but natural that more death sentences per year will be imposed under a mandatory statute than under one giving the jury discretion as to the penalty. While the 1973 Session of the Legislature did not have before it statistics now available, it could hardly have supposed that the number of death sentences would not increase, at least until the fact that the death penalty is the capital punishment in North Carolina for first degree murder, rape, first degree burglary and arson became known to those called to serve on juries.

It is also perfectly obvious that it was the hope of the 1973 Session of the Legislature to reduce the number of death sentences imposed for murder and rape. Unfortunately, the statutory device which it adopted to eliminate such cases has been held by the Supreme Court of the United States to be beyond the power of the Legislature. Furman v. Georgia, supra. By the determination, we are bound.

III. Equal Number of Death Sentences for Persons Now Sick in Hospital, Aged, Etc., for Each Penalty Is Imposed Arbitrarily.

Having first contended that the Furman case has caused a reduction in the number of death sentences, the defendant next contends that the number of death sentences imposed under the 1973 statutes is so small as to be arbitrary. Under the 1973 statutes, 14 persons have been sentenced to death for murder in the first degree and 14 persons only for rape. Of the 14 persons sentenced to death for murder in the first degree, only six actually were in the death row on 14 January 1974. There is no reason why one person should be executed and another not because of an expense and the trial and conviction of the offender.

As of 14 January 1974, exactly one complete year after the decision in State v. Waddell, supra, twenty-one persons, including the present appellant, have been sentenced to death in North Carolina for crimes committed after the decision was announced, three being co-defendants charged with the rape of the same victim.

The present appellant was the first person so to be sentenced and he is the first appeal from those so sentenced to reach this Court. It has, therefore, not yet been finally determined whether any or all of the remainder were tried and sentenced pursuant to law. Of all the twenty-one, thirteen were convicted of first degree murder only, one (the defendant) was convicted of first degree murder and of rape, five were convicted of rape only, one of first degree burglary only and one of first degree burglary and rape.

We are not advised by the defendant or by the brief of the amicus curiae as to how many individuals were brought to trial in North Carolina during the twelve month period on capital charges and no statistics on that matter are available to us. Consequently, we do not have before us the number acquitted or the number convicted of lesser, included offenses. If we had such statistical data, it would be clear evidence that the contention that the twenty-one sentenced to death were arbitrarily selected. Without discussing specific cases in these four assigned slots, it requires, at least, careful study of the records in cases where different results were reached in order to determine whether these differences in results were justified by differences in the facts. What we do know is that all defendants convicted of first degree rape before or even subsequent to January 1972, have been sentenced to death. The contention of arbitrariness is, therefore, not established.

(4) *Those Sentenced To Death Since State v. Waddell, Supra, Are Predominantly Non-White.*

The present record is completely silent as to the racial composition of the grand jury which indicted the defendant and the petit jury which found him guilty. We are quite certain that had there been no members of the defendant's race thereon, or had there been the slightest suggestion otherwise of racial discrimination in the selection of either the grand or the petit jury, the defendant and the amicus curiae would not have left us in ignorance thereof. We do know from our own repeated investigation and study of the matter in other cases in recent years that there is no systematic or widespread racial discrimination in the selection of grand or petit juries in this State. Consequently, we cannot predicate a conclusion that North Carolina juries, or in recent years have been more inclined to convict guilty Negroes than guilty white defendants of crimes for which death penalty is imposed. We reject any contention to the contrary. We are fortified in our opinion to this effect by Justice Goldberg's opinion of the death penalty and the statistical tabulation of executions contained therein.

Five of the twenty-one individuals sentenced to death in the twelve months before *State v. Waddell, supra*, were white, one is an Indian and fifteen are Negroes. Of the five white men, three were convicted of murder in the first degree, one of burglary in the first degree and of rape and one of rape only. [illegible] appeals have not been heard. As above shown, we have nothing before us on appeal by which we are able to determine the guilt or innocence of these four men, whether charged with the commission of a capital offense, that twelve month period, or were brought to trial and convicted of a lesser, included offense.

Courts can deal only with individuals brought before them on charges of criminal acts. Neither the defendant nor the amicus curiae shows or even suggests that the police officers of North Carolina have discriminated between white and Negro individuals so charged in the matter of arrest or investigation. We know of no provision in the Constitution of the United States which requires police officers, making arrests on probable cause, to arrest no more Negroes so charged or a quota of white murderers and rapists proportionate to the racial distribution of the population, has been so charged and arrested. Nor are we aware of any provision in the Constitution which requires prosecuting

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plant and the amicus curiae would lift us in ignorance thereof. We from our own reported opinions of the eighth in which death years that there is no substantial racial discrimination in the of guilt or penalty in the Consequently, we cannot preclude when that South Carolina juries recent acts have been made necessary only by the finding of crimes for which death is legally authorized

attorneys to defer bringing defendants of one race to trial until members of the other race have been tried for such offenses in proportion to the respective racial populations in the area. The experience of the twelve-month period demonstrates clearly that North Carolina juries can and will convict white defendants of capital crimes and North Carolina judges will sentence them to death upon such conviction.

The record of this Court establishes beyond question that such sentences have been and will be enforced when the accused has had a fair trial in accordance with law. In the seven years the current statutes have been a number of these cases prior to Furman v. Georgia, supra, were before this Court on appeal by prisoners convicted and sentenced to death. Sixteen were Negroes, nine were white and one was an Indian. The race of the victim of the twenty-six was germane to the decisions of the Supreme Court of the United States. Of these, eight were Negroes and two were whites. Three of the sixteen death sentences, affirmed by this Court in the seven years prior to Furman v. Georgia, supra, eight were imposed upon Negro defendants, seven upon white defendants and one upon an Indian. In those cases, each record was carefully reviewed by each member of this Court, over and beyond the matters required by the formal assignments of error, just as has been done in the present case. In each of those cases, as in the present case, the record revealed a cruel, brutal murder or rape, or both, with no extenuating circumstance whatsoever in the record of any of those cases, or in the record of this case, offers the slightest justification for the conduct, or the state of mind, that the jurors of this State have been affected by the views of the defendant in their determination that those defendants, or the present defendant, should be executed. Nothing whatsoever in those records, or in the present record, justifies the suggestion, or the supposition, that the death sentence in any of those cases, or in this one, was "freakishly" imposed or "freakishly" affirmed.

(5) *Death Is A Cruel And Unusual Punishment Because An "Enlightened" Public Opinion Has Overwhelmingly Repudiated It.*

The brief of the amicus curiae does not define its term, "enlightened." The implication, reasonably drawn from it, is that an "enlightened" person is one who opposes the death penalty. Only on this hypothesis can the statement that "enlightened" public opinion has rendered the death penalty be tenable.

Since Furman v. Georgia, supra, was decided on 29 June 1972, according to the brief of the amicus curiae, twenty states, scattered over the entire country, have reinstated capital punishment by legislation. In addition to our own decision in State v. Waddell, supra, Delaware has reinstated the death penalty by judicial decision, holding its "Merry Statute" severable from its earlier "Murder Statute." State v. Dickerson, supra. Thus, there are now twenty-two states which have made some provision, since Furman, to inflict the death penalty for one or more offenses.

According to the dissenting opinion of Mr. Justice Powell in Furman v. Georgia, supra, 408 U.S. at p. 415, 92 S.Ct. 2760, 33 L.Ed.2d 346, approximately six hundred individuals were in state and Federal prisons, throughout the country, under sentence of death at the time Furman was decided. Many others, including (in the North Carolina case under two death sentences) had had their death sentences reduced to life imprisonment just a short time earlier, by virtue of the decisions of the Supreme Court of the United States in United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138, and Pope v. United States, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317. (See: State v. Cobb, 280 N.C. 576, 187 S.E.2d 78; State v. Patterson, 279 N.C. 391, 183 S.E.2d 106; State v. Sanders, 279 N.C. 389, 183 S.E.2d 107; State v. Williams, 279 N.C. 388, 183

S.E.2d 105; State v. Atkinson, 279 N.C. 386, 183 S.E.2d 106; State v. Atkinson, 279 N.C. 385, 183 S.E.2d 105; State v. Hill, 279 N.C. 371, 183 S.E.2d 97.) As above noted, twenty one have received sentences of death in this State since 18 January 1973.

The present record shows that fifty prospective jurors were examined by the State. Of these, five were challenged by the State for cause, due to their expressed unwillingness to return a verdict which would necessitate the imposition of the death penalty under any circumstances. Seven others were challenged peremptorily by the State. Assuming that all of these peremptory challenges were due to the Solicitor's misgivings concerning the views of the prospective jurors as to the death penalty, this record shows that only twenty-four per cent of those called for jury service in this case, in Lenoir County, believed that in no case should the death penalty be imposed.

It is thus quite clear, both throughout North Carolina and throughout the nation, that there is widespread opinion that the death penalty is the appropriate punishment for certain crimes. We do not accept the pronouncement by the dissenting justices that this widespread opinion, held by legislators, judges and jurors, is "unenlightened."

(6) The Punishment Of Death Is Both Cruel And Futile.

The severity of the death penalty is obvious. For that reason, it has been, and should be, imposed only for the most serious crimes and only when the defendant's guilt of such an offense has been established beyond reasonable doubt.

The amicus curiae contends that to inflict the death penalty for any crime is futile because such penalty is not the most effective means for obtaining the goals of criminal punishment which it says are: (1) Retribution, (2) moral reinforcement or reprobation, (3) isolation of the offender, (4) reformation and rehabilitation of the offender, and (5) deterrence.

[40] Like Mr. Justice Stewart, in his opinion in Furman v. Georgia, supra, 408 U.S. at p. 308, 92 S.Ct. at p. 2761, we "cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment." The reasonable certainty, or even likelihood of a punishment commensurate with the offense, imposed by the State, is more likely to deter private effort by the family and friends of the victim to "balance the account," than is a policy of correction designed to restore the offender to society as soon as possible.

The amicus curiae acknowledges that "moral reinforcement or reprobation" doubtless requires that the most serious crimes be punished most severely." If only the death penalty is not futile so far as the attainment of this goal is concerned.

"Isolation of the offender" apparently means prevention of further crime by him. The death penalty is certainly not futile as the attainment of this objective.

Reformation and rehabilitation of the offender is obviously cut off by his execution. The present defendant, however, is not a promising prospect for rehabilitation by human punishment of any sort. Before going to trial, he was committed to one of the State hospitals for the insane for the purpose of an examination as to his sanity. He was returned for trial with the report: "Without Psychosis (Not Insane)." This evaluation of his mind is not challenged. It is not contended by the appellant or by the amicus curiae that this defendant is lacking in intelligence. Prior to the offenses with which we are now concerned, the defendant was convicted of the murders of two other persons by stabbing them. For these offenses he was imprisoned for a term of years. While serving that sentence, he was permitted to join a national civic society, the Junior Chamber of Commerce, and became the president of a chapter of this society organized within the prison. He was permitted to leave the

prison so as to attend a State convention of this organization. He took advantage of this leniency and escaped. Two days later, within a space of less than three hours, he abducted and raped a girl of his own race, whom he had never seen before, and stabbed to death a complete stranger, a teenager sitting quietly in a parked car, for the sole purpose of stealing the automobile. He callously drove off with the dying boy and abandoned his body in a roadside ditch. When arrested four days thereafter [illegible] of the Federal Bureau of Investigation he was carrying concealed on his person, another deadly knife, and his only expression of regret was that he had not had an opportunity to kill the arresting officer. The evidence in this case amply justifies the finding that society would be more effectively protected by the imposition of the death penalty than by imprisonment for life.

Whether the imposition of the death penalty [illegible] is best in deterring others from the acts committed, is a matter of opinion, upon which reasonable minds may well differ. We steadily move toward the abolition of the most extreme penalty, those that the ancients invented to express their abhorrence of unspeakable crimes. We have come to the point where we are willing to gamble for the survival rather than for the execution of those enslaved by lust. This is simply how far we are willing to go in the belief that [illegible] of execution will deter others from committing such crimes, rather than imprisonment coupled with carefully organized programs for rehabilitation designed to satisfy the prisoner that he has the sympathy of society, is necessary to bring him to the morality of the rule.

Through recent years, the efforts of North Carolina actually to impose capital punishment in the rare, the rarest instances of serious crime have been blocked by mandates of the Supreme Court of the United States stemming from Furman v. Georgia, supra, United States v. Jackson, supra, and Pope v. United States, supra. We, therefore, do not have recent experience which would support or disprove the contention of the amicus curiae that the carrying out of the death sentence in this instance would be less effective than imprisonment as a means of deterring others from like acts.

[41, 42] It is not, however, the function of this Court to determine the most efficacious punishment for the crimes of murder in the first degree and of rape. That is the function of the Legislature. Nothing in the Constitution of the United States requires that the Legislature prescribe the most efficacious punishment for crime, or even the one favored by "[illegible]" criminologists. It is sufficient that reasonable men can believe that the punishment authorized is reasonably calculated to the attainment of the goals of all criminal punishment. In our opinion, G.S. § [illegible] and G.S. § 14-21, as construed by us in [illegible] v. Waddell, supra, meet this constitutional standard.

[43] We, therefore, reject the contention of the defendant and of the amicus curiae that the imposition of the death penalty for the crimes of first degree murder and rape is, per se, a violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

No error.

BOBBITT, Chief Justice [illegible] HIGGINS and ATKINS, Justices, join in the following concurring opinion:

State v. Waddell, 282 N.C. 431, [illegible] 24 [illegible], was decided 18 January 1973. All members of this Court agreed, as stated in the majority opinion, that "the present decision [Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, decided 29 June 1972] holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death penalty if either judge or jury is permitted to [illegible] that sentence as a matter of [illegible]." 282 N.C. at 439, 194 S.E.2d at [illegible]. Waddell's death sentence was vacated and the case remanded to the superior court for a judgment of life imprisonment.

All of us agreed that *Furman* required this disposition of Waddell's case. However, the majority opinion stated that for crimes of first degree murder, rape, first degree burglary, and arson, committed after 18 January 1973, the date of the *Waddell* decision, punishment by death would be mandatory. In accord with that statement, the majority sustain the death sentences herein. Three of us dissented in *Waddell* and now dissent from that view of the law. We were and are of the opinion that the impact of *Furman* upon our statutes is to *invalidate* the imposition of punishment by *execution of death sentences until such time as our statutes are amended by the General Assembly.*

The statutes enacted by our General Assembly provide that a person convicted of first degree murder, G.S. § 14-17, or of rape, G.S. § 14-21, or of first degree burglary, G.S. § 14-52, or of arson, G.S. § 14-58, shall suffer death unless the jury, at the time of rendering its verdict in open court, recommends that the defendant's punishment shall be imprisonment for life in the State's prison. These statutes were rewritten as now appears by Chapter 265, Session Laws of 1949. The 1949 Act provided: "This Act shall be in full force and effect from and after its ratification, *but excepting shall not be effective as to crimes committed prior to its ratification.*" (Emphasis added.) The application of the 1949 Act to offenses committed prior to its ratification is further indication of the General Assembly's intent that punishment by death was not to be imposed unless the jury was given the discretion to recommend that punishment be life imprisonment and failed to make such recommendation. No changes have been made *by the General Assembly* in any of the provisions of G.S. § 14-17, G.S. § 14-21, G.S. § 14-52, and G.S. § 14-58, since the 1949 Act.

The majority (4) were of the opinion that the impact of *Furman* was to invalidate the proviso in each of these statutes; and that, upon invalidation of the proviso, the remaining portion provided unconditionally for punishment by death. The majority (3) were of the opinion that the impact of *Furman* was to invalidate *the death penalty provision* of these statutes; and that, unless and until the statutes are amended *by the General Assembly*, the punishment for each of these crimes is life imprisonment.

In *Waddell*, I expressed my dissenting views in these words: "I do not think a *death sentence* may be constitutionally fulfilled unless our *General Assembly* shall first act specifically to remove the specters which have to the undersigned prevented a jury whether the punishment shall be death or life imprisonment. In my opinion, this Court has no right to ignore, delete or repeal the provisions which were put there by the General Assembly as an integral part of its plan for the punishment of crimes for which the death sentence was permissible. *Furman* did not repeal them. This Court has no right to repeal them." *State v. Waddell*, supra, at 384, 194 S.E.2d at 31.

In *Waddell*, I reviewed [illegible] of Ohio, Connecticut, Louisiana, Oklahoma, Illinois, Pennsylvania, Arkansas, Washington, Vermont, Florida and Texas, [illegible] to the impact of *Furman* upon statutes in the states containing essentially the same provisions as our G.S. § 14-17, G.S. § 14-21, G.S. § 14-52 and G.S. § 14-58. I interpreted *Furman* as holding that no death sentence could be imposed as long as the statute(s) of the state contained provisions which left to the unbridled discretion of a judge or jury whether the punishment would be death or life imprisonment. Later decisions to the same effect were handed down in Alabama [Hubbard v. State, 290 Ala. 118, 274 So.2d 264 (1973)]; Arizona [State v. Enderton, 109 Ariz. 19, 505 P.2d 258 (1973)]; Kansas [State v. Randol, 212 Kan. 461, 513 P.2d 253 (1973)]; Maryland [Bartholomey v. State, 267 Md. 175, 297 A.2d 696 (1972)]; Massachusetts [Commonwealth v. A Juvenile, [illegible] N.E.2d 430 (1973)]; New York [People v. Fitzpatrick, 32 N.Y.2d 499, 346 N.Y.S.2d

...ly for punishment by death. The ma... (3) were of the opinion that the ho... *of Furman* was to invalidate *the death* ...*ty* provision of those statutes; and ... unless and until the statutes are ...ded *by the General Assembly*, the ...hment for each of these crimes is life ...sonment.

Waddell, I expressed my dissenting ... in these words: "I do not think any ... sentence may be constitutionally im... ... [even] ... [the] ... [sentence] ... [shall] ... or life imprisonment. In my opin... this Court has the right to impose, ... [the] ... [statutes] ... [which were] ... by the General Assembly as an ... part of its plan for the punishment ... [crimes] for which the death sentence ... [was] ... *Furman*, I do not [so] ... The Court has the right to impose ... State v. Waddell, *supra*, at 488, ... S.E.2d at 31.

Waddell, I set out [certain] ... [statutes] ... [Connecticut, Delaware, ... Pennsylvania, Virginia, North Ca... Virginia, Florida and Texas] relating ... [the] ... *Furman* and [certain] ... [statutes] ... [which] ... [the] ... [statutes] ... [as] ... [G.S. § 14-17, G.S. § 14-... G.S. § 14-52 and G.S. § 14-87. Each ... [case] *Furman* as holding that no ... [punishment] could be imposed for [any] ... [offense] of that state unless the [statute] ... [contained] [certain] ... which left to the unbridled discretion ... [of] [a] jury whether the punishment ... be death or life imprisonment. Lat... decisions to the same effect were hand... down in Alabama [Hubbard v. State, ... So. 2d 23 (Ala. 1973)]; Ari... [State v. Pederson, 107 Ariz. 117, ... P.2d 248 (1971)]; Kansas [State v. ... 207 Kan. 461, 485 P.2d 248 ...]; Maryland [Boulden v. State, ... Md. 123, 285 A.2d 669 (1972)]; Massa... setts [Commonwealth v. A Juvenile, 360 ... 2d 889 (1976)]; New York [People v. ...atrick, 32 N.Y.2d 179, 344 N.Y.S.2d ...

...708, 300 N.E.2d 139 (1973)]; South Caro... lina [State v. Gibson, S. C., 192 S.E.2d 739 ...1972)]; Tennessee [Hunter v. State, ... Tenn., 486 S.W.2d 900 (1972)].

The majority opinions in *Waddell* and in the present case cite State v. Dickerson, Del.Supr., 298 A.2d 761, the only decision which supports to any extent the views of the majority. I now add to the discussion of *Dickerson* in my dissenting opinion in *Waddell* the following: Further research ... a comprehensive revision of Title ... Parts I and 2, of the Delaware Code, ... was approved by the General Assembly of ... on 6 July 1972 and became ef... fective 1 April 1973. 58 Delaware Laws, ... Chapter 197. The portion of this revision ... entitled as Section 4209 sets forth in detail ... a new procedure for determining whether ... the punishment is to be death or life im... prisonment upon a plea or conviction of ... guilty of murder in the first degree com... mitted on or after 1 April 1973. *Dicker...* ...son was decided 1 November 1972. The ... statute to which it relates [to be obsolete ... on 1 April 1973. *Dickerson* held that first ... degree murders committed in Delaware ... during the five (5) months between 1 No... vember 1972 and 1 April 1973 are punish... able to death. My research indicates there ... has been no decision of the Supreme Court ... of Delaware since *Furman* which sustains ... a death sentence. Apparently, the four-to-three decision in this case is the only ... decision since *Furman* which sustains a ... death sentence under statutory provisions ... similar to ours.

The majority opinion in the present case ... states: "All of the members of this Court ... agreed that, notwithstanding *Furman*, these ... statutes remain in the law of South Caroli... na, in part, and only in part. The differ... ence of opinion among the members of this ... Court was as to which part of each such ... statute remained the law of this State, the ... original provision making death the man... datory punishment, or the provision, added ... by the 1949 amendment, which attempted ... to confer upon the jury the discretion for... bidden by *Furman*." These sentences do not accurately state the views of the minority. In our view, the provisions of these statutes embody an indivisible and unified plan for punishment of the felonies referred to therein. *Furman* did not purport to delete, isolate or invalidate any particular portion of the statute. *Furman* simply held that the death penalty provision under the statutes as now constituted is invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out.

On authority of *Furman*, the Supreme Court of the United States vacated the death sentences which this Court had sustained in the *Miller, Hardy and Covington, Chance, Westbrook* and *Dorsey* cases; and, pursuant to the mandate of the Supreme Court of the United States, this Court remanded these cases for judgments imposing sentences of life imprisonment. For citations, see State v. Waddell, *supra*, 282 N.C. at 473, 193 S.E.2d at 731. *Furman* did not reinstate death as the only [permissible] punishment for murder in the first degree, rape, burglary in the first degree, and arson.

The majority opinion responds to the portions of the briefs of defendant and of the *amici curiae* which urge this Court to do what the Supreme Court of the United States refused to do in *Furman*, that is, to hold that punishment by death constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Being of the opinion that, for the reasons stated herein, the death sentences must be vacated and the cases remanded for judgments of life imprisonment, I refrain from discussing these matters otherwise than by repeating this statement from my dissenting opinion in *Waddell*, viz: "I agree that the *Furman* decision has not established the proposition that capital punishment under all circumstances constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. However, nothing in the *Furman* decision

would seem to invalidate a statute of our General Assembly prescribing death as the sole and exclusive punishment for murder in the first degree, rape, burglary in the first degree, or arson. Whether such a statute should be enacted is for legislative determination." 282 N.C. at 473, 194 S.E. 2d at 43.

Since the provisions of G.S. § 14-17 (murder in the first degree) and G.S. § 14-21 (rape) are now the same as when *Furman* was decided, I think the only permissible course is *to vacate each of the death sentences and to remand the cases for the pronouncement of judgments of life imprisonment.*

SHARP, Justice, concurring further in the dissenting opinion of Chief Justice BOBBITT.

To Chief Justice BOBBITT'S succinct interpretation of the effect of the *Furman* decision upon our statutes which have specified the punishment for first-degree murder, rape, first-degree burglary, and arson, I can add nothing. He has expressed my views exactly. However, I make the following comments:

In my view the death sentence is not constitutionally impermissible as cruel and unusual punishment for first-degree murder and rape. The question of capital punishment, however, is one of unquestionably public policy to be determined by the legislature. It is not for this Court to declare either by unanimous decision or four-three division.

In 1949 the legislature, in effect, made the punishment for first-degree murder, rape, first-degree burglary, and arson death or life imprisonment as the jury, in its discretion, might determine. In 1972 the *Furman* decision wrecked that plan by outlawing the imposition of the death penalty under any statute which permitted either judge or jury to impose it as a matter of discretion. On 18 January 1973 this Court, in the four-three *Waddell* decision, completed the destruction of the legislative plan by making the death sentence mandatory for the four crimes when committed after that date. Since these two decisions the legislature has not rewritten the affected statutes. Surely it is time for the General Assembly to exercise its constitutional legislative prerogative. N.C.Const. art. I, § 6 declares, "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."

STATE of North Carolina

v.

Tommy HOWELL.

No. 10.

Supreme Court of North Carolina.

Feb. 28, 1974.

Defendant was convicted in the Superior Court, Orange County, Clarence W. Hall, J., of rape, and he appealed. The Supreme Court, Moore, J., held that proceeding for cause of jurors who stated that it would be impossible for them to bring in a verdict of guilty was not improper; it was also held that challenge of all Negroes by solicitor did not establish arbitrary and systematic exclusion of Negroes; it was also held that argument of solicitor was not improper, and that death sentence was not unauthorized or cruel and unusual punishment.

No error.

Higgins, J. dissented as to death sentence in an opinion.

1. Jury ⇐85

Decisions as to a juror's competency to serve rests in trial judge's sound discretion.

by making the death sentence manda- for the four crimes when committed r that date. Since these two decisions egislature has not rewritten the affect- latutes. Surely it is time for the Gen- Assembly to exercise its constitutional, lative prerogative. N.C.Const. art. I, § clares, "The legislative, executive, and ate judicial powers of the State gov- ent shall be forever separate and dis- from each other."

STATE of North Carolina

v.

Tommy NOELL.

No. 16.

Supreme Court of North Carolina.

Feb. 25, 1978.

Defendant was convicted in the Superior Court, Orange County, Clarence W. J., of rape and he appealed. The Supreme Court, Sharp, J., held that exclusion of jurors who stated that it would be impossible for them to bring in a verdict of guilty was not improper, it was held that challenge of all Negroes by State did not establish arbitrary and systematic exclusion of Negroes; it was held that admission of testimony was proper, and that death sentence was not unauthorized or cruel and unusual pun- ishment.

No error.

Higgins, J., dissented as to death sentence in an opinion.

1. Criminal Law ⇐1158(3)

Trial judge's rulings on questions as to competency of jurors are not subject to review on appeal unless accompanied by some asserted error of law. G.S. § 9-14.

3. Jury ⇐107

Three prospective jurors who stated unequivocally that they could not find defendant guilty even though State convinced them beyond a reasonable doubt of his guilt were not impartial jurors and were properly excused for cause.

4. Jury ⇐94(1)

Although a defendant has the right to be tried by jury from which members of his own race have not been systematically and deliberately excluded, a defendant does not have a right to be tried by a jury containing members of his own race or even to have a representative of his own race serve on the jury.

5. Jury ⇐120

Burden is upon defendant challenging racial composition of jury to establish racial discrimination in the composition of the jury.

6. Jury ⇐94(1)

Defendant's mere showing that all Negroes were challenged by the solicitor was not sufficient to establish a prima facie case of arbitrary and systematic exclusion of Negroes and defendant failed to carry burden of showing arbitrary and systematic exclusion.

7. Jury ⇐116(11)

Refusal of trial court to grant defendant's motion to excuse for cause a juror who expressed the view that defendant's inter-racial marriage could adversely affect her deliberations would not be considered error where court told defendant's counsel he could further examine juror, counsel chose not to do so and excused her peremptorily and did not request an additional peremptory challenge.

8. Jury ⇐108

If a prospective juror states that under no circumstances could he vote for a verdict that would result in imposition of death penalty no matter how aggravated the case and regardless of the evidence shown, juror can properly be dismissed upon a challenge for cause.

9. Jury ⇐123

Prospective jurors who stated that they would not be willing to return a verdict in a rape case pursuant to which defendant might be lawfully executed, whatever the evidence might be, were properly excused for cause.

10. Jury ⇐102

Refusal to excuse for cause a juror who in certain questioning appeared to indicate an unwillingness to return a verdict of not guilty after hearing the evidence even if he had reasonable doubt about defendant's guilt, but who stated, in reply to further questioning by the court that he would not hesitate to return a verdict of not guilty if he had a reasonable doubt as to defendant's guilt was not an abuse of discretion.

11. Criminal Law ⇐1169.2(5)

Where prosecuting witness related certain hearsay as to cause of certain subcutaneous hemorrhages, and upon objection court properly allowed motion to strike and instructed jury not to consider what witness had been told, such instruction was sufficient and trial court would not be considered to have committed prejudicial error by not further instructing the jury to disregard the testimony.

12. Criminal Law ⇐674

Court's instructions to jury to not consider statement of a witness as to normal procedure in any normal rape case were sufficient to call attention of jurors to fact that statement should not be taken as evidence, and court would not be considered to have erred even though it did not fur-

APPENDIX D

SUPREME COURT OF NORTH CAROLINA — Spring Term 1974

STATE OF NORTH CAROLINA)
)
v) No. 36 - Robeson
)
JAMES EDWARD (JIMMY) BRITT)

Appeal by defendant from Bailey, J., 27 August 1973 Session Robeson Superior Court.

Criminal prosecution upon a bill of indictment charging defendant Jimmy Britt with the first degree murder of Clarence Blackwell. Upon his arraignment, defendant, through counsel, entered a plea of not guilty.

The following is a summary of the evidence introduced at the trial. Carl Herring, a deputy sheriff of Robeson County, testified that on 3 May 1973, at about ten o'clock p.m., Jimmy Britt came to his house and reported that Clarence Blackwell had been harassing Blackwell's estranged wife, Carolyn. Defendant offered to give the officer $10 if he would "look Blackwell up." Deputy Herring told defendant that under the circumstances related to him, there was nothing he could do. He advised defendant to go home, and told defendant that he would follow Mrs. Blackwell to work that night, and if her husband violated any law, he would place him under arrest. Defendant then told the officer that if he (Herring) couldn't take care of it, he (Britt) could. Britt further stated that "he would take care of him and that he was not going to mess her that night like he did the night before." Later, in response to a radio message, Deputy Herring and Deputy Sanderson proceeded to the residence occupied by Carolyn Blackwell and her children. Upon arriving on these premises at approximately eleven o'clock, they found the body of Clarence Blackwell lying face down in the front yard. At that time, the officers observed a wound in Blackwell's back and two wounds in the front of his body. No weapons were found in Blackwell's automobile or near his body. A pocket knife was found in a chair in the living room of the residence. Officer Herring later saw defendant at the hospital where he was being treated for cuts on his hand, arm, stomach and back.

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David Blackwell, decedent's ten year old son, testified that he was awakened by a noise on the night of 3 May 1973, and upon going into the hall, he saw defendant and his father fighting in a chair. He saw his father run out the front door with his hands in the air, and at that time defendant fired a short gun toward the front door. Defendant then picked up a longer gun and left. David said that he found an open pocket knife in the living room which he recognized as his father's knife. He closed the knife and put it under a cushion of the chair in which the two men had been fighting. He did not see his father after he ran out the front door.

Mrs. Neill Watson testified that she lived next door to Mrs. Blackwell on 3 May 1973. On that night at about ten o'clock, she saw defendant's truck and a patrol car stopped down the road. After the patrol car left, she saw defendant's car leave and go toward town. A few minutes later she saw defendant follow Mrs. Blackwell's automobile toward town. They both returned in a short time and entered the Blackwell house. Later she saw Mr. Clarence Blackwell enter the house, and in about three or four minutes Mr. Blackwell ran from the house with his hands upraised. She heard a shot and saw Mr. Blackwell pitch from the porch into the yard. She heard him say, "Oh my God." She observed these latter occurrences from her window next to Mrs. Blackwell's house.

Billy Ray Watson, the fifteen year old son of Mrs. Neill Watson, testified that he saw defendant's truck sitting in the driveway of their yard at about ten o'clock p.m. This driveway led to defendant's house. At that time, a patrolman was sitting about fifty feet down the road. Defendant left immediately after the patrolman. He later saw Mrs. Blackwell and Jimmy Britt enter the Blackwell house at about 10:25 p.m. A short time later he heard a horn blow, and upon going into the front yard, he saw and talked with Mr. Clarence Blackwell. The next time he saw Mr.

Blackwell, he was ". . . coming through the front door, he was moving fast. His hands were being held like this. (indicating) They were up in the air, raised. I heard a shot. When I heard it, Mr. Blackwell was right close to the doorsteps. He was on the porch. When I heard the shot, Mr. Blackwell fell forward and I heard him say, 'Oh, my God.' I didn't see him wiggle after he hit the ground. That is basically what happened that night." He was standing at the window by his mother when he saw Mr. Blackwell run from the house.

Dr. Marvin Thompson, a physician specializing in pathology, testified that he performed an autopsy on the body of Clarence Blackwell. He found an entry wound in his back and two exit wounds in his abdomen. He was unable to say how the single bullet caused the two exit wounds but theorized that the bullet might have split. In his opinion Clarence Blackwell died from a hemorrhage resulting from a gunshot wound.

H. L. Higgins testified that he sold defendant a .357 magnum pistol three or four days before Clarence Blackwell was shot.

The State rested, and defendant's counsel moved for a dismissal and a directed verdict of not guilty. The Motions were denied.

Defendant, Jimmy Britt, testified that on 3 May 1973, between 9:00 and 10:00 p.m. Clarence Blackwell called him and told him that he was going to kill him and Blackwell's estranged wife, Carolyn. Defendant stated that he went to the police station where he talked to Officer Wesley Taxley. Upon leaving the police station, he talked to an auxiliary policeman named John McLendon. After calling Carolyn Blackwell, he went to see Deputy Sheriff Carl Herring who told him that, "He couldn't go." He then went to Carolyn Blackwell's house and again called the police station. After calling the police station, he returned to the couch where he had been sitting, and at that time Clarence

Blackwell burst into the room and began cutting him. Despite his attempts to get away, Blackwell cut him on his back, leg and stomach. While he was being cut, he managed to reach his pistol and shoot Blackwell. He then picked up his shotgun and left, leaving Blackwell crawling out the door. He went to the police station and from there to the hospital. On cross-examination he admitted that he had been "going with" Carolyn Blackwell since March, and that he went to her house on the night of 3 May 1973, armed with a pistol and a shotgun.

Police Officer Hurley Haywood testified that he saw defendant at about ten o'clock p.m. on 3 May 1973. Defendant told him that he was having trouble with Clarence Blackwell and asked him if it was illegal for him to carry a shotgun in his truck. He next saw defendant at about 10:43 p.m. in the police station after defendant had been cut.

John D. McLendon testified that he saw defendant at about 10:00 p.m. on 3 May 1973, and Britt, at that time, told him that a man was threatening to kill him.

Carolyn Blackwell testified that defendant came to her house on the night of 3 May 1973, armed with a shotgun and a pistol. While she and defendant were sitting in the living room, her husband rushed into the room. Defendant picked up his shotgun, and she went to the back of the house. She went to the Britt home but shortly returned and left the premises with her children. She saw something on the ground in front of her house as she was leaving. On cross-examination, she admitted that she had been going with Jimmy Britt since March.

Mrs. Neill Watson was recalled to the stand, and she testified that she could clearly see Blackwell as he ran out of the house.

Defendant rested, and the State recalled Deputy Sheriff Herring who identified a .357 magnum pistol as the weapon which he had obtained from defendant's home. This pistol was introduced

into evidence. On cross-examination, Deputy Sheriff Herring stated:

> "I have had an opportunity to examine the Watson home since Court yesterday. It is true that the two windows of that home, on the west side nearest the driveway, are boarded up. I went to the open window on the west side of that home and stood in front of it and looked back toward the front porch. You can see about half the porch but I could not see the front door. I could see the outer part of the steps but I couldn't see them right up next to the porch. . . ."

Both the State and defendant rested. Judge Bailey denied defendant's Motions for dismissal and a directed verdict of not guilty.

The jury returned a verdict of guilty of murder in the first degree, as charged in the bill of indictment. Defendant appealed from judgment sentencing him to death by asphyxiation.

Attorney General Robert Morgan by Assistant Attorney General Jean A. Benoy, Jr. and Associate Attorney Archie W. Anders for the State.

Johnson, Kenneth, Klein & Campbell by John Michael Campbell for the defendant appellant.

BRANCH, Justice.

Defendant first assigns as error the action of the trial judge in denying his Motions for "a Judgment of Dismissal" and a directed verdict of not guilty.

The Motion to Dismiss and the Motion for a Directed Verdict of not guilty presented the question of whether the evidence was sufficient to warrant its submission to the jury and to support a verdict of guilty of the offense charged in the indictment. State v. Cooper, 275 N.C. 333, 167 S.E.2d 253. These Motions have the same legal effect as a Motion for Judgment in case of nonsuit. State v. Glover, 270 N.C. 210, 154 S.E.2d 305.

The lodging of these Motions when the indictment charges first degree murder requires the trial judge to determine whether the evidence, when taken in the light most favorable to the State, is sufficient to raise a legitimate inference, and to permit the jury to find that a defendant, after premeditation and deliberation, formed a fixed purpose to kill and thereafter accomplished his

purpose. State v. Johnson, 276 N.C. 252, 172 S.E.2d 499; State v. Perry, 270 N.C. 338, 172 S.E.2d 541.

All of the evidence in this case discloses that defendant did intentionally shoot deceased with a deadly weapon thereby proximately causing his death. Defendant's counsel, therefore, properly restricts his argument to the question of whether the evidence was sufficient to permit a jury to find that defendant acted after premeditation and deliberation.

Premeditation means thought beforehand for some length of time, however short. State v. Johnson, supra; State v. Lowe, 277 N.C. 701, 178 S.E.2d 65, cert. den. 404 U.S. 960, 30 L.Ed.2d 74, 92 S.Ct. 323.

Deliberation does not require brooding or reflection for any appreciable length of time, but imports the execution of an intent to kill in a cool state of blood without legal provocation, and in furtherance of a fixed design. State v. Johnson, supra; State v. Lowe, supra.

"Cool state of blood" does not mean the absence of passion and emotion, but an unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time unless such anger or emotion was such as to disturb the faculties and reason. State v. Rogers, supra; State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. den. 368 U.S. 951, 7 L.Ed.2d 49, 82 S.Ct. 93.

In State v. Van Landingham, 283 N.C. 320, 196 S.E.2d 559, we stated:

> "Ordinarily it is not possible to prove premeditation and deliberation by direct evidence. These facts must be established by proof of circumstances from which they may be inferred. Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: [illegible] the conduct of defendant before and after the killing; use of grossly excessive force; [illegible] after the occasion has been called."

See State v. Walters, 275 N.C. 615, 170 S.E.2d 434, and State v. Fountain, 282 N.C. 58, 191 S.E.2d 674.

In instant case, there was evidence of ill feeling between defendant and Clarence Blackwell, stemming from defendant's relationship with Blackwell's estranged wife.

On the evening of the shooting, defendant told Deputy Sheriff Herring that he had been to the City Police, talked to them about Clarence Blackwell, and "didn't get no satisfaction." He told the Deputy that if he couldn't take care of Blackwell, he, defendant could. He said that Clarence Blackwell was not going to "mess" Carolyn Blackwell that night like he did the night before. Defendant had purchased the .357 magnum pistol some three or four days prior to the shooting. He took this weapon and a shotgun into Mrs. Blackwell's house, placed the shotgun on the couch where he was sitting and laid the pistol on a nearby table. Defendant testified he shot Clarence Blackwell with the .357 magnum pistol.

Three witnesses testified that Clarence Blackwell had his hands raised and was fleeing from defendant when the shot was fired. Expert medical testimony tended to show that Clarence Blackwell died as a result of a gunshot wound that entered from his back, and that there were no powder burns on deceased's body.

After the shooting, defendant did not attempt to aid the stricken victim, but according to his own testimony, "I cocked the gun and started to shoot him again and thought I better not. He was on the floor at the time and coming after me. I was going to shoot him." Defendant then walked out of the house carrying the pistol and the shotgun. He testified that he left Blackwell on the floor, "pulling or crawling or something."

This evidence, when taken in the light most favorable to the State, is sufficient to allow a legitimate inference of premeditation and deliberation so as to require the trial judge to submit murder in the first degree to the jury.

The trial court properly refused to grant defendant's Motions for Judgment of Dismissal and a directed verdict of not guilty.

Following the jury verdict of guilty of murder in the first degree, defendant moved that the verdict be set aside as being contrary to the weight of the evidence and the law. This motion was denied. Defendant then moved for a new trial. This motion was also denied.

We find no merit in defendant's contention that the trial judge erred in denying these motions to set aside the verdict and for a new trial on the ground that the verdict was contrary to the greater weight of the evidence. The motions were addressed to the sound discretion of the trial judge, and in the absence of abuse of discretion are not reviewable on appeal. G. S. 15-174; G. S. 14-1, Rule 59; State v. Briggers, 307 N.C. 181, 187 S.E.2d 585; Pruitt v. Ray, 300 N.C. 322, 82 S.E.2d 378; State v. Hagstaff, 310 N.C. 15, 12 S.E.2d 897; 6A Moore's Federal Practice, ¶ 59.08(5). No abuse of discretion is shown. Neither do we find any fatal defect on the face of the record proper which would support defendant's motion for arrest of judgment. State v. Chestnutt, 241 N.C. 401, 85 S.E.2d 297; State v. Higgins, 255 N.C. 399, 146 S.E.2d 681.

Defendant next assigns as error the ruling of the trial judge permitting the introduction into evidence of a .357 magnum pistol. He argues that this weapon was not sufficiently connected with the commission of the offense to permit the trial court to admit it into evidence.

Defendant testified that he shot Clarence Blackwell with a .357 magnum pistol. Later on direct examination by defendant's counsel, Deputy Sheriff Herring testified that Britt's wife brought the weapon and a shotgun to him after the shooting.

Thereafter Deputy Herring was called as a rebuttal witness and testified that he received State's Exhibit 4, a .357 magnum pistol, from defendant's wife on the night of the shooting, that it

had been in his possession since that time, and that it was the weapon described by defendant in his testimony as being the one used in the shooting of Clarence Blackwell.

Any object which has a relevant connection with the case is admissible in evidence. State v. Sneeden, 274 N.C 498, 104 S.E.2d 190; State v. Hamilton, 284 N.C. 277, 141 S E 2d 503. Thus, weapons may be admitted into evidence when there is evidence tending to show that they were used in the commission of a crime. State v. Crowder, 236 N C. 42, 293 S E.2d 36; State v. Patterson, 234 N.C. 150, 260 S E.2d 16; State v. Wilson, 280 N C. 674, 187 S E 2d 22; State v. Sneeden, supra; 1 Stansbury's North Carolina Evidence § 115 (Brandis Revision, 1973).

Here the evidence was sufficient to identify State's Exhibit 4 as the pistol used in the commission of the crime charged. Even absent such identification, admission of the exhibit would been been harmless error in view of defendant's testimony admitting that he shot Clarence Blackwell with a .357 magnum pistol. State v. Wilson, supra.

Defendant contends that the trial judge erred in two instances by refusing to admit testimony concerning conversations he had with police officers. The record does not disclose what the witness would have said had he been permitted to testify.

> "Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial. This rule applies as well to questions asked on cross-examination."

State v. Kirby, 276 N C. 123, 171 S.E.2d 416. Accord, State v. Staten, 271 N.C. 600, 157 S.E 2d 223. See 3 N.C. Index 2d, Criminal Law § 169 and cases there cited.

There is no merit in this contention.

Defendant argues that the trial judge erred in refusing to permit him to testify as to the condition of the rear door of the residence in which the shooting took place.

On redirect examination of defendant, the following occurred:

"After I got out of the hospital, I made an examination of the back screen. I could see where the bullet went, and I found the holes in the back screen door, two holes about as far apart through the screen. (indicating)

Q. State whether or not they were there before the shooting if you know.
A. No, sir, they were not.
MR. BRITT: Object.
THE COURT: Sustained."

It should be noted that there was no motion to strike this testimony and that the trial judge gave no instruction to the jury to disregard the testimony. Defendant seems to have successfully placed before the jury testimony which tended to show that the bullet exited from Blackwell's body and went through the back screen, and thereby in some degree refuted the testimony that Blackwell was shot as he ran out the front door with his hands upraised. We see no prejudice to defendant in this ruling.

Defendant contends that the trial judge committed prejudicial error during the voir dire examination of prospective jurors by, in effect, ruling that defendant's counsel could not examine prospective jurors concerning their moral or religious scruples, beliefs and attitudes toward capital punishment.

During the voir dire examination of prospective jurors by Mr. Britt for the State, the following colloquy occurred:

"JUROR: Mr. Solicitor, I wanted to inquire whether if we find [illegible] guilty the death penalty would be involved, as I am against capital punishment and would not vote to convict a person knowing that he would be sentenced to death.

MR. BRITT: The Court will have to answer your question.
THE COURT: Mr. Juror, the question of punishment should be of no concern to you; the jury has nothing to do whatsoever, with punishment in this or any other criminal case. [illegible]
[illegible]
[illegible]: Well, sir, I just wanted the Solicitor to know that I was opposed to capital punishment." (Emphasis ours.)

It was stipulated by counsel for defendant and by the State that in the trial of this cause Judge Bailey ruled that no

mention was to be made in the presence of the jury of the fact that this was a capital case or that the death penalty might be imposed.

It is well established by our decisions and the decisions of the federal courts that in a capital case both the State and the defendant may, on the voir dire examination of prospective jurors, make inquiry concerning a prospective juror's moral or religious scruples, his beliefs and attitudes toward capital punishment, to the end that both the defendant and the State may be insured a fair trial before an unbiased jury. Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770; Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824; Logan v. United States, 144 U.S. 263, 36 L.Ed. 429, 12 S.Ct. 617; Turberville v. United States, 303 F.2d 411, cert. den. 370 U.S. 946, 8 L.Ed.2d 813, 82 S.Ct. 1407; State v. Crowder, 265 N.C. 48, 143 S.E.2d 33; State v. Roell, 234 N.C. 670, 68 S.E.2d 730; State v. Honeycutt, 276 N.C. 174, ___ S.E.2d ___. A prospective juror's response to such inquiry by counsel may disclose basis for a challenge for cause or the exercise of a peremptory challenge. The extent of the inquiries, of course, remains under the control and supervision of the trial judge.

It was error for the trial judge to refuse to allow counsel for defendant and the Solicitor for the State to inquire into the moral or religious scruples, beliefs and attitudes of the prospective jurors concerning capital punishment.

It is apparent that the decision of the United States Supreme Court in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726, and our interpretations of the effects of the Furman decision as related to punishment in capital cases have created much uncertainty among lawyers, the judiciary, and the general public, the source of the triers of fact in most litigation. It is [illegible] that the enactment in the 1974 General Assembly of Senate Bill 107, "An Act to Amend G. S. 14-17 Murder Defined and

Punishment Provided for Murder, Rape, Burglary and Arson", Chapter 1331, Session Laws 1973-74 (effective 6 April 1974), will for a time accentuate this uncertainty. We, therefore, deem it proper to clarify the law concerning the duty of the trial judge to instruct the jury as to punishment in capital cases, and to further clarify the law as to the right of counsel to argue the question of the death penalty to a jury.

Initially we consider the question of whether the trial judge in a capital case has the duty to instruct the jury on the question of punishment.

During the jury deliberations, the following occurred in open court:

> [illegible]: Mr. Foreman, has the Jury agreed upon a verdict?
> [illegible]: We have, sir.
> [illegible]: Would the defendant please stand?
> (Defendant complies;)
> [illegible]: What -
> [illegible]: Just a minute, please, sir.
>
> Ladies and Gentlemen of the Jury, how do you find the defendant, guilty of murder in the first degree as charged in the bill of indictment, or guilty of murder in the second degree, or guilty of voluntary manslaughter, or guilty of [illegible] thereof or not guilty?
> [illegible]: Guilty-second degree murder, with mercy.
>
> [illegible]: That is not a possible verdict. The verdict must be either guilty of murder in the first degree or guilty of murder in the second degree or guilty of voluntary manslaughter or not guilty. If the jury is unable to unanimously agree on the punishment to be imposed for murder in the first degree, then the jury should return a verdict of guilty of murder in the second degree.
> (Emphasis added.)

The question of whether the trial judge should inform the jury as to the punishment which a verdict would allow or require him to impose was considered by this Court in State v. Rhodes, 275 N.C. 234, 166 S.E.2d 816. In that case, defendant was convicted of rape and the jury recommended life imprisonment. The Court imposed the mandatory life sentence as then required in [illegible]. The Court of Appeals, [illegible] among other things, that the trial judge committed prejudicial error in refusing [illegible] the jury, in the event of a verdict of guilty, the penalty which could be imposed upon conviction of the lesser offense of

assault with intent to commit rape. Holding the Court's action to be nonprejudicial error, this Court, speaking through Justice Sharp, stated:

> "In this jurisdiction, except in one class of cases, the jury fixes the punishment for a convicted defendant within the limits provided by law for the particular crime. The one class of excepted cases in which the jury may fix the penalty upon each of its members is murder. G.S. 14-17 (murder in the first degree); G.S. 14-21 (murder in the first degree); G.S. 14-3 (burglary in the first degree); G.S. 14-58 (arson). In all other [illegible], the jury is instructed as to punishment and considers that only when it returns its verdict of guilty or not guilty. State v. Davis, [illegible] 77 N.C. [illegible]; State v. Hamby, [illegible] 276 N.C. [illegible]; State v. Matthews, 234 N.C. 377, 381 S.E. 2d 786.
>
> "[illegible] the absence of such controlling statute [illegible] the punishment to be imposed upon a defendant convicted of a crime is a matter which the court in its discretion is required to determine [illegible]. An instruction to the jury that it is duty bound to [illegible] the court in fixing punishment is manifestly inadequate to the full exercise of judicial discretion. This, however, [illegible] as far as [illegible] is concerned. The error will be considered like any other." (Emphasis added)

At the time Boone was decided, the trial judge in capital cases was required to charge on punishment because of the provisions in G.S. 14-17 which permitted the jury to recommend upon return of their verdict that the punishment should be life imprisonment, thereby fixing the punishment to be imprisonment for life. That statute and the language in Boone which stated that the trial judge should not inform the jurors as to punishment in "ordinary" capital cases was the basis for this case, also a capital case, in which the trial judge in State v. Vaughan, [illegible], discussed the effect of the jury to recommend life imprisonment. Since the decision in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, a conviction in a capital case which occurred after 18 January 1972, requires the [illegible].

[illegible] after the decision in Boone and Waddell, we have

[illegible] as to punishment. See State v. Henderson, 285 N.C. 1, 203 S.E.2d

10; State v. Watkins, 300 N.C. 524, 168 S.E.2d 730; State v. Washington, 283 N.C. 175, 195 S.E.2d 534; State v. Waddell, supra.

In State v. Waddell, supra, we said:

"The punishment to be imposed for these capital felonies is no longer a discretionary question for a jury and it becomes no matter a proper subject for an instruction by the judge."

In State v. Watkins, supra, the jury convicted the defendant of murder in the first degree and recommended mercy. Defendant appealed from a sentence of death by asphyxiation. One of defendant's assignments of error was that the trial judge failed to inform the jury that a conviction of murder in the first degree would result in a mandatory sentence of death. The assignment of error was overruled on the ground that no prejudice resulted to the defendant since the death sentence was being vacated by this Court pursuant to the holding in Waddell that the death penalty could not be imposed as a result of a capital trial conducted prior to 29 February 1972. The case was remanded for imposition of a sentence of life imprisonment as provided by law. This Court entered a similar judgment vacating the death sentence and remanding for imposition of a life sentence in State v. Washington, supra.

In the case of State v. Washington, supra, this Court [illegible] that the trial judge did not err [illegible] to the jury that [illegible] was guilty of murder in the first degree, "if you find from the evidence beyond a reasonable doubt that [illegible] and that he killed [illegible] with malice, and if you further find from the evidence beyond a reasonable doubt that the killing was unlawful and was not done in the heat of passion suddenly aroused by adequate provocation." The case was considered on 9 August 1972. This Court found the error to be prejudicial on the issue of guilt or innocence, and speaking through Chief Justice Bobbitt, in part, stated:

"[illegible] to [illegible]

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> murder in the first degree, rape, burglary in the first degree and arson committed [illegible] 13 January [illegible]. . . ."

The record in Washington does not disclose whether counsel were allowed to inquire of prospective jurors as to their religious or moral convictions and their attitudes toward the death penalty.

We again considered this question in the case of State v. Henderson, supra. There defendant was charged with rape and first degree burglary. During the jury deliberations the jury returned to the courtroom and the following exchange took place between the trial judge and the foreman of the jury:

> "THE COURT: I understand the jury has a question?
>
> FOREMAN: Yes, sir, we would like further instructions regarding the punishment and whether or not we can make a recommendation.
>
> THE COURT: First of all, I will instruct you the penalty to be imposed is solely not your concern. Your function is to pass on the guilt or not guilt as to both counts. Now, I will not instruct you on what the penalty will be, that is not a concern of yours. As far as the recommendation is concerned, you cannot make a recommendation. You find him guilty or not guilty according to the evidence and the instructions I have given you."

In Henderson, we held that the trial judge properly refused to instruct the jury as to the punishment which would result from a conviction of rape or first degree burglary. Again, the record in Henderson does not disclose whether the trial judge precluded counsel from examining prospective jurors concerning their beliefs and attitudes toward capital punishment. It should be noted that the trial judge elected to answer the main inquiry from the jury by explaining to them that they could not make any recommendation. We did not discuss the question of whether such compelling reasons existed as to require disclosure of punishment.

The purpose of an instruction is to clarify the issues for the jury and to apply the law to the facts of the case. State v. Jamison, 272 N.C. 137, 171 S.E.2d 447; Stern Fish Co. v. Snowden, 233 N.C. 239, 63 S.E.2d 537, 7 N.C. Index 2d, Trials § 32.

We must always remain advertent to the fact that the paramount duty of the trial judge is to control the course of a trial so as to prevent injustice to any party. In the exercise of this duty he possesses broad discretionary powers. Creer v. Whittington, 251 N.C. 630, 111 S.E.2d 913; Miller v. Greenwood, 218 N.C. 146, 10 S.E.2d 708.

It must be borne in mind that at the present time, neither the trial judge nor the jury has discretion in imposing punishment when a person is convicted of a capital crime, State v. Waddell, supra, and that in capital cases all prospective jurors may be examined concerning their attitudes toward capital punishment. State v. Crowder, supra.

We cannot perceive how the question of instruction concerning the penalty in a capital case can often arise in light of the above-stated principles of law. Nevertheless, we here reaffirm and adhere to the proposition that ordinarily it is not the duty of the trial judge in criminal actions to instruct the jury as to punishment. However, we recognize that in a capital case, there may be a "compelling reason which makes disclosure as to punishment necessary in order 'to keep the trial on an even keel' and to insure complete fairness to all parties. . . " State v. Rhoden, supra. Thus in a capital case if the jury appears to be confused or uncertain, the trial judge should act to alleviate such uncertainty or confusion. Specifically, if the trial judge observes that the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence, in our opinion, sufficient compelling reason exists to justify him informing the jury of the consequence of their possible verdicts.

In instant case, when the jury returned a verdict of "first degree murder, with mercy", it became apparent that the jurors were confused as to the law and as to their duties as jurors. At that point the trial judge should have informed them

that under the existing law, neither the jury nor the Court had any discretion as to punishment if the jury returned a verdict of guilty of first degree murder. The need for such action on the part of the trial judge is underscored by the fact that on two occasions the trial judge used language in the presence of the jury which might well have left the jury with the erroneous impression that he had some discretion in imposing punishment in the event the jury returned a verdict of guilty of murder in the first degree. Further the gravity of this case, and the apparent confusion and uncertainty among the jurors when the unanimous verdict was returned, demanded more clarification as to possible verdicts than the statement: "The verdict must be either guilty of murder in the first degree or guilty of whatever you find him guilty of."

Finally, we consider whether counsel may argue to the jury the question of the death penalty in a capital case.

In State v. Dilliard, 223 N.C. 77, 25 S.E.2d 6, the defendant was convicted of first degree murder. On appeal, defendant assigned as error the ruling that defendant's counsel could not make an argument to the jury upon the question of punishment. The Court, speaking through Justice Ervin, held that there was no error in the Court's ruling that defendant's counsel could not make an argument to the jury upon the question of the punishment to be imposed.

In his brief in this Court, counsel for Dilliard properly, though in our opinion erroneously, argued at length that the imposition of the death penalty upon a defendant lawfully convicted of murder in the first degree was a violation of such defendant's constitutional rights, contending that the death penalty is cruel and unusual punishment as a matter of law. Such an argument to a jury would be improper for the reason that the law of this State is otherwise. Counsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory

provision fixing the punishment for the offense charged. G. S. 14-17; State v. Crisp, 244 N.C. 497, 94 S.E.2d 603, 67 A.L.R.2d 201; Annot. 67 A.L.R.2d 213. He may not, however, state the law incorrectly or read to the jury a statutory provision which has been declared unconstitutional. See, State v. Benner, 168 N.C. 210, 220, 83 S.E. 21. Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find his guilty of a lesser offense or acquit him entirely.

State v. Hilliard, supra, did not hold that counsel, in his argument to the jury, cannot inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge. Rather Hilliard stands for the proposition that counsel may not argue the question of punishment in the nature of attacking the validity, constitutionality, or propriety of the imposition of the death penalty.

We do not deem it necessary to consider the remaining assignments of error since they may not arise at the next trial.

For reasons stated, there must be a

New trial.